73124

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 1912.

No. [illegible] 18.

ADAMS EXPRESS COMPANY, PLAINTIFF IN ERROR,

vs.

E. H. CRONINGER.

IN ERROR TO THE CIRCUIT COURT OF KENTON COUNTY, STATE OF KENTUCKY.

FILED FEBRUARY [illegible], 1913.

(22,031.)

(22,031.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 213.

ADAMS EXPRESS COMPANY, PLAINTIFF IN ERROR,

vs.

E. H. CRONINGER.

IN ERROR TO THE CIRCUIT COURT OF KENTON COUNTY, STATE OF KENTUCKY.

INDEX.

	Original.	Print
Caption	1	1
Petition (omitted in printing)	1	—
Summons (" ")	2	—
Sheriff's return (" ")	3	—
Order filing answer (" ")	3	—
Answer (" ")	3	—
Order filing motion for judgment	8	1
Motion for judgment for defendant	8	1
Orders continuing motion for judgment	8	1
Order withdrawing petition and answer, filing amended pleadings, and submitting on demurrer, &c.	9	1
Judgment	9	2
Amended petition	10	2
Answer to amended petition	11	2
Demurrer to answer	16	5
Order filing petition for writ of error, &c.	16	5
Order granting writ of error	16	5
Order filing writ of error bond and citation	16	5
Petition for writ of error	17	6

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 15, 1911.

	Original	Print
Writ of error (copy) ..... (omitted in printing) ..	18	–
Bond on writ of error ..... (" ") ..	20	—
Citation (copy) ..... (" ") ..	21	—
Clerk's certificates	22	7
Judge's certificate	22	7
Writ of error (original)	23	8
Citation and service (original)	25	9
Designation by plaintiff in error of parts of record to be omitted in printing and consent thereto	26	9

1–7 Pleas Before the Honorable the Kenton Circuit Court, at the Court-house in Covington, on the 19th Day of January, 1910.

M. L. Harbeson, Judge.

Common Law & Equity Division.

E. H. CRONINGER
ag'st
ADAMS EXPRESS COMPANY, a Joint Stock Association under the Laws of New York.

* * * * * * *

8 *Def't Filed Mo. for Judg't.*

At a sitting of said Court on Mar. 11th, 1909:
"The defendant filed in Clerk's office motion for judgment."

Motion.

Said motion is as follows:—
Defendant moves the Court to enter judgment for defendant.

MAXWELL & RAMSEY,
Atty's for Defendant.

At a sitting of said Court on Mar. 15th, 1909:
"The motion for judgment is continued."
At a sitting of said Court on Mar. 22nd, 1909:
"The motion for judgment is continued."
9 At a sitting of said Court on Mar. 29th, 1909:
"The motion for judgment is continued."
At a sitting of said Court on Apr. 5th, 1909:
"The motion for judgment is continued."
At a sitting of said Court on Apr. 12th, 1909:
"The motion for judgment is continued."
At a sitting of said Court on Apr. 17th, 1909:
"The motion to enter judgment for defendant, is continued indefinitely to be called up by the parties."
At a sitting of said Court on Nov. 8th, 1909:
Came the parties by their Attorneys and by consent the petition and answer herein are withdrawn, and the plaintiff files an amended petition in open court, the defendant an answer to said amended petition, and the plaintiff a general demurrer to said answer, and by consent said demurrer is submitted. This cause came on to be heard upon the demurrer of the plaintiff to the answer of the defendant to the amended petition, was argued by counsel and was submitted to the Court, upon consideration thereof, the said demurrer is sustained, to which defendant excepts, and the defendant not desiring to plead further, it is considered and adjudged that the plaintiff E. H. Croninger, recover from the defendant Adams Ex-

press Company the sum of One Hundred and thirty-seven dollars and fifty cents ($137.50) and his costs herein expended to all of which defendant excepts.

10 *Amended Petition.*

Said amended petition is as follows:—

The plaintiff is and at the time hereinafter set forth was engaged in business in Cincinnati, Ohio, as a manufacturing jeweler, which is and at said time was well known to defendant. The defendant is a joint stock association organized under the laws of the State of New York, and engaged in business in the County of Kenton, State of Kentucky, and elsewhere, as a common carrier of goods for hire.

On the 21st day of December, 1907, plaintiff delivered to defendant a package containing a diamond ring, the property of plaintiff, which defendant accepted, and, in consideration of a charge of twenty-five (25¢) cents paid to it by plaintiff undertook and agreed, as such common carrier, to carry safely from Cincinnati, Ohio, to Augusta, Georgia and there deliver to J. W. Clendenning. The market value of said ring at Cincinnati, Ohio, and Augusta, Georgia, was one hundred and twenty-five ($125.00) Dollars. Said ring was delivered to defendant in a sealed package marked "J. W. Clendenning, Augusta, Georgia," and stamped "From Ed. H. Croninger, Glenn Building, Cincinnati, Ohio," and was accepted without any inquiry or demand being made by defendant to know its value or contents. Defendant did not safely carry said ring to Augusta, Georgia, and there deliver it to said J. W. Clendenning, nor has it ever been delivered to him or to plaintiff but by reason of the carelessness and negligence of defendant's agents and servants, said ring was lost in the course of transportation, to plaintiff's damage in the sum of one hundred and twenty-five ($125.00) Dollars.

Wherefore plaintiff prays for judgment against the said defendant, Adams Express Company, in the sum of one hundred and twenty-five ($125.00) Dollars, with interest from the 31st
11 day of December 1907, and for costs.

JOHN R. SCHINDEL,
Attorney for Plaintiff.

STATE OF OHIO,
Hamilton County, ss:

E. H. Croninger, being first duly sworn, deposes and says that he is the plaintiff in the above entitled action, and that the allegations contained in the foregoing amended petition are true as he verily believes.

ED. H. CRONINGER.

Sworn to and subscribed in my presence this 13th day of August, 1909.

[SEAL.] JOHN R. SCHINDEL,
Notary Public, Hamilton County, Ohio.

My commission expires July 14, 1911.

Answer.

Said answer is as follows:—

The defendant admits that plaintiff was and is a manufacturing jeweler in Cincinnati, Ohio, and that defendant is a joint stock association and common carrier as alleged in the petition and that on December 21, 1907, defendant accepted and received from plaintiff at Cincinnati said ring, and in consideration of twenty-five cents then and there paid to it by plaintiff, undertook as a common carrier to transport the same from Cincinnati, Ohio, to J. W. Clendenning at Augusta, Georgia.

Ever since the passage of the Act of Congress approved June 29, 1906, c. 3591, 34 Stat. 584, entitled "An Act to amend an act entitled an Act to Regulate Commerce, approved February 4,
12 1887, and all acts amendatory thereof, and to enlarge the powers of the Inter-State Commerce Commission:" defendant has been an Express Company engaged in inter-state commerce, and in respect of such commerce has been subject to the provisions of said act to regulate commerce approved February 4, 1887, and on December 21, 1907, and prior thereto was an express company and common carrier within the meaning and purpose of said act, engaged in the transportation of property wholly by railroad from Cincinnati, Ohio, to Augusta, Georgia.

After said Act of Commerce approved June 29, 1906, went into effect and long prior to December 21, 1907, defendant in accordance with Section 6 of said Act, duly filed with the Inter-state Commerce Commission, schedules showing its rates and charges for transportation from Cincinnati, Ohio, to Augusta, Georgia, and printed and posted the same and kept them open to public inspection, all as required by said Act. Said schedules show that defendant's rates and charges where the value of the property to be carried was in excess of fifty dollars, were graduated reasonably according to its value, and that the charge for the transportation of property of the kind and weight of plaintiff's said package from Cincinnati, Ohio, to Augusta, Georgia, was twenty-five cents if its value was fifty dollars or less, and was fifty-five cents if its value was one hundred and twenty-five dollars, and the lawful rate on December 21, 1907, for the transportation of said ring, established by said schedules so filed and published, was twenty-five cents if said ring was of the value of fifty dollars or less, and was fifty-five cents if it was of the value of one hundred and twenty-five dollars. Plaintiff well knew that defendant's charge for carriage was based on the value
13 of the shipment, and that the company required said value to be declared by the shipper, and that in failing to disclose the value of said ring when he delivered it to defendant at Cincinnati for transportation to Augusta, Georgia, the rate charged was and would be based on a valuation of not more than fifty dollars. Plaintiff also knew that if he had declared the value of said ring at $125.00, defendant's charge for carriage would have been in excess of twenty-five cents.

Plaintiff delivered said ring to defendant in a sealed package, and

defendant did not know the contents or value thereof. If defendant had known that the value of said package was one hundred and twenty-five dollars, it would not have received the same for transportation to Augusta, Georgia, for less than fifty-five cents, and in consideration of said rate, it would have managed the transportation of the package between Cincinnati and Augusta in a manner that would have required more trouble and expense and would have afforded greater protection and security against loss than the manner in which said package was actually carried and handled by the defendant on its supposition that the value thereof was fifty dollars or less.

Defendant in good faith, believing that the value of said package was fifty dollars or less, accepted and carried the same under the following written contract or bill of lading which it issued signed by its agent and delivered to the plaintiff, and which the plaintiff accepted when he delivered said package to the defendant for transportation, to-wit:

(Here follows bill of lading marked p. 14.)

The Company's charge is based upon the value of the property, which must be declared by the shipper.

180 A

ADAMS EXPRESS COMPANY.

(NON-NEGOTIABLE BILL OF LADING.)

CINCINNATI, O. Dec. 21st 1907

Received from C. H. Croninger

one P'kg.

Valued at $

Marked J. W. Clendenning

Augusta. Ga.

Which the Company agrees to carry upon the following terms and conditions, to which the shipper agrees, and as evidence thereof, accepts this bill of lading.

1. In consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding fifty dollars unless a greater value is declared, the shipper agrees that the value of said property is not more than fifty dollars, unless a greater value is stated herein, and that the Company shall not be liable in any event for more than the value so stated, nor for more than fifty dollars if no value is stated herein.

2. If the Express Company has not an agency at the point of destination, it shall carry the property to its agency nearest or most convenient thereto, and there notify the consignee, or deliver the property to some other carrier to continue the transportation. The Adams Express Company shall not be liable for loss or damage occurring after such delivery, nor for detention after having tendered the property to a connecting carrier.

3. The Express Company shall not be required to make free delivery at points where it maintains no free delivery service, nor at any point beyond its established delivery limits.

4. The Express Company, unless negligent, shall not be liable for loss, damage or detention of said property caused by civil or military authority, piracy, insurrection, strikes or riot, or by the act of any person acting as an officer of the law, whether with or without lawful process, warrant or authority, or by the dangers of railroad transportation, the perils of navigation, changes of temperature, heat, cold, wet or decay, nor for the death, injury or escape of live freight, the Company not being a carrier thereof except at owner's risk.

5. Said property is accepted as merchandise only, and the Express Company shall not be liable in any event for the loss of money, specie, bonds, coupons, or other negotiable paper, which the Company does not receive or carry except through its money department provided for that purpose.

6. The Express Company shall not be liable for loss, damage or detention of said property unless a claim therefor shall be presented to it in writing at this office within ninety days from this date with this contract or a copy thereof annexed; nor shall the Company be liable in any suit to recover for the loss, damage or detention of said property unless the same shall be commenced within one year after such loss, damage or detention shall have occurred, and not afterwards.

7. Articles of GLASS, articles contained in glass and fragile articles are accepted at OWNER'S RISK.

8. If any C. O. D. is not paid within thirty days the shipper agrees that the Express Company may return the property, and that he will pay the charges for transportation both ways.

9. The terms and conditions of this contract shall apply to any forwarding or return of said property, and shall inure to the benefit of every carrier to whom the same may be entrusted to complete the transportation.

Paid

CHARGES (25¢)

For the Company, Roe. Sl'd.

Number of Pieces Received. 1

Liability limited to $50 unless a greater value is declared.

15 Defendant admits that it did not deliver said ring to said J. W. Clendenning or the plaintiff and says that it was lost in the course of transportation, but not by any willful or gross act of defendant or its agents, and that it was not converted by it or them.

Defendant sets up and relies on said Act of Congress to Regulate Commerce as amended, and especially on Sections 6 and 10 thereof, and on the Act of Congress of February 19, 1903, c. 708 entitled "An act to further regulate commerce with foreign nations and among the States," 32 Stat. 847, and on the Inter-State Commerce Clause of the Constitution of the United States, as a defense to this action.

LAWRENCE MAXWELL,
JOSEPH S. GRAYDON,
Attorneys for Defendant.

COMMONWEALTH OF KENTUCKY,
Kenton County:

W. L. Dickson, being first duly sworn, says that he is agent of the Adams Express Company, that said Company and its officers are absent from and do not reside in this State; that he has read its foregoing answer and believes the same to be true.

W. L. DICKSON.

Sworn to before me and subscribed in my presence this 6th day of October 1909.

[SEAL.] JOS. B. THEISSEN,
Notary Public, Kenton County, Kentucky.

My commission expires January 21st 1910.

16 *Demurrer.*

Said demurrer is as follows:—

The plaintiff demurs to the answer of defendant to the amended petition because it does not state facts sufficient to constitute a defense.

JOHN R. SCHINDEL,
Attorney for Plaintiff.

Def't Filed Writ of Error and Assignment of Error.

At a sitting of said Court on Jan. 19th, 1910:

"Came the defendant, and filed in open court its petition for a writ of error, and assignment of error herein.

Order.

On consideration of the application of the defendant for a writ of error herein, from the Supreme Court of the United States, it is

ordered by the Court, being the highest Court of the State in which a decision in this suit can be had, that said Writ of Error, be and the same hereby is, granted to operate as a Supersedeas on the defendant giving Bond, conditioned according to law, in the sum of $1000.

Def't Filed Writ from U. S. Ct. Court.

The defendant filed in open Court a Writ from the United States Circuit Court for the Eastern District of Kentucky, directing the Clerk of this Kenton Circuit Court to certify to the Supreme Court of the United States a true and complete transcript of the record in this case.

Def't Filed Bond.

The defendant filed in open court a Bond, in the sum of $1000, which being examined, is approved by the Court.

Def't Filed Citation.

The defendant also filed in open court citation and return thereon.

17–21 Said petition for writ of Error and Assignment of Errors is as follows:—

Petition.

To the Honorable M. L. Harbeson, Judge of the Circuit Court of Kenton County, Kentucky:

Adams Express Company prays for a writ of error from the Supreme Court of the United States to review a final judgment rendered against your petitioner in the suit above entitled, on the 8th day of November, 1909, by the Circuit Court of Kenton County, Kentucky, that being the highest Court of the State in which a decision in the suit could be had, and assigns as error:

1. The answer of defendant to which said Court sustained a demurrer set up a valid defense to the cause of action stated in the amended petition, which defense was based on the Act of Congress approved June 29, 1906, C. 3591, 34 Stat. 584, entitled "An act to amend an Act entitled an Act to Regulate Commerce, approved February 4, 1887, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," and on the Act of Congress of February 19, 1903, C. 708 entitled "An Act to further regulate Commerce with foreign nations and among the States," 32 Stat. 487 as amended, and on the Inter-State Commerce clause of the Constitution of the United States:

2. Said answer set up a valid defense to said action based on said Acts of Congress and on the Inter-State Commerce clause of the Constitution of the United States, for any sum in excess of $50.00:

Adams Express Company therefore prays that the judgment of the Circuit Court of Kenton County, Kentucky may be reversed.

ADAMS EXPRESS COMPANY,
By Its Attorneys, LAWRENCE MAXWELL,
JOSEPH S. GRAYDON.

* * * * * * *

22 COMMONWEALTH OF KENTUCKY,
Sixteenth Judicial District, Kenton County, set:

I, Ben Macke, clerk of the circuit court for said county and district in said State, certify that the preceding 22 page- contain a complete and true transcript of the record in the cause mentioned in the caption thereto.

Given under my hand and the seal of said court this 25" day of January, 1910.

BEN MACKE, *Clerk.*
A. C. ELLIS, JR., *Deputy.*

COMMONWEALTH OF KENTUCKY,
Sixteenth Judicial District, Kenton County, set:

I, M. L. Harbeson, judge of the said judicial district of said State, and by virtue of said office, sole judge of said circuit court, certify that Ben Macke was at the date of the foregoing certificate and is now the clerk of said court, and A. C. Ellis, Jr., his deputy, duly appointed and qualified, that the signature of said deputy to said certificate is genuine and that said certificate and the seal of said court thereto affixed are in due form of law and executed and affixed respectively by the proper officer.

Witness my hand, as judge as aforesaid, this 25" day of January, 1910.

M. L. HARBESON,
Judge Kenton Circuit Court, Common Law & Equity Division, Sixteenth Judicial District of Kentucky.

COMMONWEALTH OF KENTUCKY,
Sixteenth Judicial District, Kenton County, set:

I, Ben Macke, clerk of the circuit court for said county and district, in said State, certify that M. L. Harbeson, whose genuine signature appears to the next foregoing certificate, was at the date thereof and is now, judge of said judicial district of said State, and sole judge of said circuit court.

Given under my hand and the seal of said court, this 25 day of January, 1910.

BEN MACKE, *Clerk.*
A. C. ELLIS, JR., *Deputy.*

23 Filed in Open Court Jan. 19, 1910. Ben. Macke, Clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Kenton Circuit Court, Commonwealth of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Kenton Circuit Court, Commonwealth of Kentucky, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between E. H. Croninger, plaintiff and Adams Express Company, a joint-stock association under the laws of New York, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of
24 a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Adams Express Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 19 day of January, in the year of our Lord one thousand nine hundred and Ten.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

JOS. C. FINNELL,
Clerk of the Circuit Court of the United States for the Eastern District of Kentucky.

Allowed by
M. L. HARBESON,
Presiding Judge of Kenton Circuit Court, Commonwealth of Kentucky.

25 UNITED STATES OF AMERICA, *ss:*

To E. H. Croninger, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Circuit Court of Kenton County, Kentucky, wherein Adams Express Company, a joint-stock association under the laws of New York is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable M. L. Harbeson, Presiding Judge of Kenton Circuit Court, Commonwealth of Kentucky, this 19th day of January, in the year of our Lord one thousand nine hundred and ten.

M. L. HARBESON,
Presiding Judge of Kenton Circuit Court, Kentucky.

Service acknowledged this Jan. 19th, 1910.

JOHN R. SCHINDEL,
Attorney for E. H. Croninger.

26 Supreme Court of the United States.

ADAMS EXPRESS COMPANY, Plaintiff in Error,
vs.
E. H. CRONINGER, Defendant in Error.

Notice for the Purpose of Abridging the Printed Record under Rule 9, Clause 10.

Plaintiff in error considers the following portions of the record unnecessary for the consideration of the case on the errors which it has assigned, and it therefore proposes to omit the same in printing the record, towit:—

Petition (p. 1).
Summons and return thereof (p. 2).
Answer (pp. 3 to 8).
Copy of the writ of error (pp. 18 and 19).
Bond (p. 20).
Copy of citation (p. 21).

LAWRENCE MAXWELL,
JOSEPH S. GRAYDON,
Counsel for Plaintiff in Error.

CINCINNATI, O. *February 14th,* 1910.

We hereby acknowledge service of the foregoing notice and consent that the portions of the record designated by the plaintiff in error may be omitted in printing.

MORISON R. WAITE,
JOHN R. SCHINDEL,
Counsel for Defendant in Error.

27 [Endorsed:] File No. 22,031. Supreme Court U. S. October Term, 1909. Term No. 805. Adams Express Company, Pl'ff in Error, vs. E. H. Croninger. Designation by Plaintiff in error of parts of record to be omitted in printing and consent of counsel for defendant in error thereto. Filed February 23, 1910.

Endorsed on cover: File No. 22,031. Kentucky, Kenton County, Circuit Court. Term No. 213. Adams Express Company, plaintiff in error, vs. E. H. Croninger. Filed February 23d, 1910. File No. 22,031.

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. ~~213~~. 18

ADAMS EXPRESS COMPANY, *Plaintiff in Error*,

vs.

E. H. CROMWELL, *Defendant in Error*.

Error to the Circuit Court of Kenton County, Kentucky.

BRIEF FOR PLAINTIFF IN ERROR.

LAWRENCE MAXWELL,
JOSEPH S. GRAYDON,
Attorneys for Plaintiff in Error.

THE HENNEBERT PRINTING COMPANY, 1013-1023 Elm Street, Cincinnati, O.

Analysis of the Argument.

PAGE.

Statement of the Case 1

The federal question raised by the answer 2

Assignment of errors 5

Extracts from the Interstate Commerce Acts 6

The general purpose and intent of the Interstate Commerce Act as expounded by this court would be set at naught if the judgment of the court below were permitted to stand 12

Instances showing how the application of the rule adopted by the court below would create preferences between interstate shippers 22

Special application of the Carmack Amendment by which Congress assumed possession of the domain of the liability of initial carriers for losses on their own lines and on the lines of connecting carriers 24

Pennsylvania Railroad Company vs. Hughes, 191 U. S. 477, considered 25

The right of the States to apply their varying laws ceased when Congress acted; Northern Pacific Ry. Co. vs. State of Washington, 222 U. S. 370 33

The proviso in the Carmack Amendment cannot be construed so as to nullify the plain purpose of the main clause 37

PAGE.

Defendant's liability under section 20 of the Interstate Commerce Act is governed by the principle announced in Hart vs. Pennsylvania R. R. Co., 112 U. S. 331, and does not exceed $50 in this case 38

The highest courts of five states have construed this section as not invalidating a fair contract of carriage whereby liability is limited to the value fixed by the shipper and accepted by the carrier as the basis for fixing the rate 44

Bernard vs. Adams Express Co., 205 Mass. 254.

Greenwald vs. Barrett, 199 N. Y. 170.

Travis vs. Wells, Fargo & Co., 79 N. J. L. 83.

P. C. C. & St. L. Ry. Co. vs. Mitchell (Indiana), 91 N. E. 735.

Larsen vs. Oregon Short Line R. Co. (Utah), 110 Pac. 983.

Plaintiff cannot maintain the action because it is founded on a transaction on his part which is declared to be a fraud on the defendant and a public offense by Acts of Congress 54

Decision of the Supreme Court of Illinois in Ellison vs. Adams Express Co., 245 Ill. 410, so holding..... 58

Rulings of the Interstate Commerce Commission 64

Cases in this court applying the maxim; Ex turpi causa non oritur actio 68

Reasons based on public policy why the maxim should be applied in this case 74

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 213.

ADAMS EXPRESS COMPANY, *Plaintiff in Error,*

vs.

E. H. CRONINGER, *Defendant in Error.*

Error to the Circuit Court of Kenton County, Kentucky.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This was a suit in the Circuit Court of Kenton County, Kentucky, by Croninger as plaintiff against the Adams Express Company as defendant. The amended petition alleges that the plaintiff was engaged in business in Cincinnati as a manufacturer of jewelry; that on December 21, 1907, he delivered to the defendant a package containing a diamond ring which defendant accepted and, in consideration of a charge of 25 cents paid to it by plaintiff, undertook and agreed as a common carrier to carry safely from Cincinnati, Ohio, to Augusta, Georgia, and there deliver to one Clendenning; that the value of the ring was $125.00; that it was

delivered to the defendant in a sealed package; was accepted without any inquiry or demand being made by defendant to know its value or contents; and that it was not delivered to the consignee but lost in the course of transportation by reason of the carelessness and negligence of defendant's servants and agents. Judgment was prayed for $125.00 with interest and costs.

The answer alleges that ever since the passage of the Act of Congress, approved June 29, 1906, c. 3591, 34 Stat. 584, amending the Interstate Commerce Act, defendant has been an express company engaged in interstate commerce and in respect of such commerce has been subject to the provisions of the Interstate Commerce Act, and on December 31, 1907, and prior thereto, was an express company and common carrier within the meaning and purpose of said Act, engaged in the transportation of property wholly by railroad from Cincinnati, Ohio, to Augusta, Georgia; that after said Act of June 29, 1906, went into effect and long prior to December 21, 1907, defendant in accordance with section 6 of said Act, duly filed with the Interstate Commerce Commission schedules showing its rates and charges for transportation from Cincinnati, Ohio, to Augusta, Georgia, and printed and posted the same and kept them open to public inspection all as required by said Act; that said schedules show that defendant's rates and charges where the value of the property to be carried was in excess of $50.00 were graduated reasonably according to its value and that the charge for the transportation of property of the kind and weight of plaintiff's said package from Cincinnati, Ohio, to Augusta, Georgia, was 25 cents if the value was $50.00 or

less, and was 55 cents if its value was $125.00, and the lawful rate on December 21, 1907, for the transportation of said ring would be, by said schedules so filed and published, 25 cents if said ring was of the value of $50.00 or less, and 55 cents if it was of the value of $125.00; that plaintiff well knew that defendant's charge for carriage was based on the value of the shipment and that it required said value to be declared by the shipper, and that in failing to disclose the value of said ring when he delivered it to defendant at Cincinnati for transportation to Augusta, Georgia, the rate charged was and would be based on the valuation of not more than $50.00, and knew that if he had declared the value of said ring at $125.00, defendant's charge for carriage would have been in excess of 25 cents; that plaintiff delivered said ring to defendant in a sealed package and defendant did not know the contents or value thereof, and if defendant had known that the value of said package was $125.00, it would not have received the same for transportation to Augusta, Georgia, for less than 55 cents, and in consideration of said rate would have managed the transportation of the package between Cincinnati and Augusta in a manner that would have required more trouble and expense and would have afforded greater protection and security against loss than the manner in which the package was actually carried and handled by defendant on the supposition that the value thereof was $50.00 or less; that defendant in good faith believed that the value of said package was $50.00 or less and accepted and carried the same under a written contract or bill of lading which it issued, signed by its agent, and delivered to the plaintiff, and which plaintiff accepted when he

delivered the package to the defendant for transportation. The answer then sets out a copy of the bill of lading which contains the following notice in large type at the top:

> "The Company's charge is based upon the value of the property which must be declared by the shipper."

The bill of lading recites that the Company agrees to carry the package upon the following terms and conditions to which the shipper agrees, and as evidence thereof accepts this bill of lading. The first of said terms and conditions is as follows:

> "1. In consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding fifty dollars unless a greater value is declared, the shipper agrees that the value of said property is not more than fifty dollars, unless a greater value is stated herein, and that the Company shall not be liable in any event for more than the value so stated, nor for more than fifty dollars if no value is stated herein."

The bill of lading shows no value stated therein.

The answer admits that the defendant did not deliver the ring to the consignee and alleges that it was lost in the course of transportation, but not by any wilful or gross act of defendant or its agents, and that it was not converted by it or them. The answer specifically sets up and relies on the Act of Congress of June 29, 1906, to regulate commerce, and especially on section 6 and 10 thereof, and on the Act of Congress of February 19, 1903, c. 708, 32 Stat. 847,

entitled "An Act to further regulate commerce with foreign nations and among the States," and on the Interstate Commerce Clause of the Constitution of the United States as a defense to the action.

The plaintiff filed a demurrer to the amended answer on the ground that it does not state facts sufficient to constitute a defense (Rec. 5). On November 8, 1909, the court sustained the demurrer to the answer, and defendant declining to plead further, judgment was entered against it for $137.50 and costs (Rec. 1). Defendant sued out a writ of error from this court to the Circuit Court of Kenton County, that being the highest court of the state in which a decision in the suit could be had (Rec. 5).

ASSIGNMENT OF ERRORS.

The petition for writ of error and the assignment of errors is found at page 6 of the Record. The errors assigned are briefly as follows:

The answer of defendant to which the court sustained a demurrer set up a valid defense to the cause of action stated in the amended petition based on the Act of Congress, approved June 29, 1906, c. 3591, 34 Stat. 584, and on the Act of Congress of February 19, 1903, c. 708, 32 Stat. 487, and on the interstate commerce clause of the Constitution of the United States.

Said answer set up a valid defense to said action based on said Acts of Congress and on the interstate commerce clause for any sum in excess of $50.00.

EXTRACTS FROM THE INTERSTATE COMMERCE ACTS.

The Act to Regulate Commerce approved February 4, 1887, as amended by the Act of June 29, 1906, c. 3591, 34 Stat. 584, and in force at the time when the transaction in this case occurred, provided in section one that the term "common carrier as used in this act shall include express companies."

Section 2 reads:

> "That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Section 3 in part provides:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or

locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 6 in part provides:

"That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively,

are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.

. . . . . .

No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers, or property, except such as are specified in such tariffs: . . ."

Section 10 in part provides:

"Any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall

willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this Act, or for whom as consignor or consignee any such carrier shall transport property, who shall knowingly and willfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court."

Section 20 in part provides:

> "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.
>
> That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment or transcript thereof."

Section one of the Act of February 19, 1903, c. 708, 32 Stat. 847, entitled, "An Act to further regulate commerce with foreign nations and among the States," commonly known as the Elkins Act, as amended by section two of the Act of June 29, 1906, c. 3591, 34 Stat. 584, provides that:

> "The willful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts, or strictly

to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction, etc., . . . and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce, and the acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction, etc., ..."

". . . Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereof or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this act."

ARGUMENT.

I.

The judgment of the State Court denies effect to the general purpose and to specific provisions of the Interstate Commerce Acts, and deprives defendant of rights secured thereby.

The allegations of the answer, which are admitted by the demurrer, show that the suit is founded on a transaction on the part of the shipper, which is declared to be illegal as a fraud on the carrier by section ten of the Interstate Commerce Act, and which by that section and by section one of the Elkins Act is denounced as a public offense. The judgment of the State court which nevertheless holds the defendant liable to the plaintiff for a sum in excess of the value on which the interstate rate was based cannot be maintained consistently with the purpose and intent of the acts. The recognition of the power in the State court to enforce such judgment "would not only destroy the remedy intended to be afforded by the provisions in question, but would cause the statute to fructify the growth of the wrongs which it was intended to extirpate," to use the language of Mr. Justice White in New Haven R. R. vs. Interstate Commerce Commission, 200 U. S. 361, 395.

The court has expounded the general purposes and effect of the Interstate Commerce Acts in many cases.

In Armour Packing Company vs. United States, 209 U. S. 56, 72, Mr. Justice Day, delivering the opinion, said:

> "The views of this court, speaking through Mr. Justice White, in New York, New Haven & Hartford R. R. vs. Interstate Commerce Commission, 200 U. S. 361, 391, are apposite here:

'It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. . . . The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer.'

The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published and posted as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published."

In Texas & Pacific Railway Co. vs. Abilene Cotton Oil Company, 204 U. S. 426, a shipper sued in a State court to

recover a part of the charges paid to the railroad company on interstate shipments, on the ground that the charges exacted were unjust and unreasonable. The charges complained of were those which the railroad company had filed with the Interstate Commerce Commission under the provisions of the act. The State court held that it had jurisdiction and rendered judgment in favor of the shipper. This court held that the right asserted by the shipper and sustained by the State court was repugnant to the act to regulate commerce. Mr. Justice White, delivering the opinion, stated the underlying proposition to be "the effect of the act to regulate commerce upon the claim asserted by the oil company" (p. 435). After pointing out that an action could be maintained at common law by a shipper to recover an overcharge from a carrier, he said (p. 436):

> "As the right to recover, which the court below sustained, was clearly within the principles just stated, and as it is conceded that the act to regulate commerce did not in so many words abrogate such right, it follows that the contention that the right was taken away by the act to regulate commerce rests upon the proposition that such result was accomplished by implication. In testing the correctness of this proposition we concede that we must be guided by the principle that repeals by implication are not favored, and indeed that a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the preexisting right is so repugnant to the statute that the survival of such right would in

effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory."

At p. 437 he said:

"Let us, without going into detail, give an outline of the general scope of that act with the object of fixing the rights which it was intended to conserve or create, the wrongs which it proposed to redress and the remedies which the act established to accomplish the purposes which the law-makers had in view.

The act made it the duty of carriers subject to its provisions to charge only just and reasonable rates. To that end the duty was imposed of establishing and publishing schedules of such rates. It forbade all unjust preferences and discriminations, made it unlawful to depart from the rates in the established schedules until the same were changed as authorized by the act, and such departure was made an offense punishable by fine or imprisonment, or both, and the prohibitions of the act and the punishments which it imposed were directed not only against carriers but against shippers, or any person who, directly or indirectly, by any machination or device in any manner whatsoever, accomplished the result of producing the wrongful discriminations or preferences which the act forbade. It was made the duty of carriers subject to the act to file with the Interstate Commerce Commission created by that act copies of established schedules, and power was conferred upon that body to provide as to the form of the schedules, and penalties were imposed for not establishing and filing the required schedules.

At p. 439, he said:

"When the general scope of the act is enlightened by the considerations just stated it becomes manifest

that there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination. This follows, because, unless the requirement of a uniform standard of rates be complied with it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate to be unreasonable and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced. This can only be met by the suggestion that the judgment of a court, when based upon a complaint made by a shipper without previous action by the Commission, would give rise to a change of the schedule rate and thus cause the new rate resulting from the action of the court to be applicable in future as to all. This suggestion, however, is manifestly without merit, and only serves to illustrate the absolute destruction of the act and the remedial provisions which it created which would arise from a recognition of the right asserted."

At p. 444 he reviewed several decisions of the court in the following language:

"In Gulf, Colorado, etc., Ry. vs. Hefley, 158 U. S. 98, the facts were these: A rate had been fixed by a carrier in a bill of lading for an interstate shipment, which rate was less than that established under the provisions of the act to regulate commerce. On arrival of the goods at destination the carrier refused to deliver on tender of payment of the bill of lading rate, and demanded payment of and collected the higher established schedule rate. For so doing the carrier was proceeded against under a statute of the State of Texas, imposing a penalty upon a carrier for charging more than the rate fixed in a bill of lading. A judgment of the State court, enforcing the penalty, was reversed, upon the ground that the state statute, as applied, was repugnant to the act to regulate commerce, the court saying (p. 102):

'The carrier cannot obey one statute without sometimes exposing itself to the penalties prescribed by the others. Take the case before us. If, in disregard of the joint tariff established by the defendant and the St. Louis and San Francisco Railway Company and filed with the Interstate Commerce Commission, the latter company, as a matter of favoritism, had issued this bill of lading at a rate less than the tariff rate, both the defendant company and its agent, would, by delivering the goods upon the receipt of only such reduced rate, subject themselves to the penalties of the national law, while, on the other hand, if the tariff rate was insisted upon, then the corporation would become liable for the damages named in the state act. In case of such a conflict the state law must yield.'

In Texas & Pacific Ry. Co. vs. Mugg, 202 U. S. 242, the facts were as follows: On an interstate ship-

ment a given rate, less than the lawful schedule rate, was quoted to the shipper by the agent of the railroad at the point of shipment. On the arrival of the goods at their destination the road exacted the schedule rate, whilst the shipper insisted he was entitled to the lower and quoted rate. And a recovery of the excess collected over the quoted rate was allowed by a court of the State of Texas. Reversing the judgment, it was here held that the rate fixed in the schedule filed pursuant to the act to regulate commerce was controlling, that it was beyond the power of the carrier to depart from such rates in favor of any shipper, and that the erroneous quotation of rates made by the agent of the railroad did not justify recovery, since to do so would be in effect enabling the shipper, whose duty it was to ascertain the published rate, to secure a preference over other shippers, contrary to the act to regulate commerce."

In Louisville and Nashville Railroad Co. vs. Mottley, 219 U. S. 467, it was held that a contract made before the passage of the act, to give transportation in consideration of a release from liability for injuries, was invalidated by the act, the purpose of Congress being "to establish uniform rates for transportation, to give all the same opportunity to know what the rates were as well as to have the equal benefit of them" (p. 476), and to "cut up by the roots every form of discrimination, favoritism and inequality" (p. 478). Mr. Justice Harlan, who delivered the opinion, referred (p. 477) to Union Pacific Ry. vs. Goodridge, 149 U. S. 690, in which it was decided that the general rule that the release of an unliquidated claim for damage was good consideration for a promise as between the parties, could have no application

where the promise was to furnish transportation on an interstate railroad. The reason given is that "the legislature, upon grounds of public policy, and for the protection of third parties, has made certain requirements with regard to equality of rates which, in their practical application, would be rendered nugatory if this rule were given full effect."

Baltimore & Ohio R. R. Co. vs. United States ex rel. Pitcairn Coal Company, 215 U. S. 481, is another case illustrating the principle that a right of action existing apart from the provision of the statute must, since the passage of the statute, be enforced under its terms so as to secure the uniformity of application at which it aims. It was held that a circuit court of the United States could not issue mandamus to compel non-discriminative distribution of the railroad company's cars to customers. It was said "that the primary interference of the courts with the administrative functions of the Commission was wholly incompatible with the act to regulate commerce" (p. 494).

In New York, New Haven & Hartford R. R. Co. vs. Interstate Commerce Commission, 200 U. S. 361, which held that a carrier cannot contract to sell a commodity and to transport it in completion of the contract when the stipulated price does not pay the cost of purchase, the cost of delivery and the published freight rates, Mr. Justice White, delivering the opinion, said, at p. 391:

> "The previous decisions of this court concerning the Interstate Commerce Act do not afford much aid in determining this question. This is the case, because, although that act was adopted in 1887, and questions concerning the import of the act have been

often here, such questions have not generally involved the operation and effect of the act concerning the command that published rates be adhered to, and the prohibitions against discrimination, favoritism or rebates, but have mainly concerned the meaning of the act in other respects, that is, involved deciding whether powers asserted as to other subjects were vested by the act in the Interstate Commerce Commission. . . .

It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. That a carrier engaged in interstate commerce becomes subject as to such commerce to the commands of the statute, and may not set its provisions at naught whatever otherwise may be its power when carrying on commerce not interstate in character, cannot in reason be denied. Now, in view of the positive command of the second section of the act, that no departure from the published rate shall be made, 'directly or indirectly,' how can it in reason be held that a carrier may take itself from out the statute in every case by simply electing to be a dealer and transport a commodity in that character? For, of course, if a carrier has a right to disregard the pub-

lished rates by resorting to a particular form of dealing, it must follow that there is no obligation on the part of a carrier to adhere to the rates, because doing so is merely voluntary. The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier as a public agent to give equal treatment to all."

In Melody vs. Great Northern Ry. Co., 25 S. D. 606, 127 N. W. 543, the court said:

"There can be no doubt, we think, under the construction given the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379), by the federal courts, that every person dealing with an interstate carrier is as effectually bound by the law and the orders of the Commission, as to both freight and passenger tariffs, as is the carrier himself. To hold that either party under any conditions may be estopped from asserting the illegality and invalidity of a contract made in violation of the interstate commerce law and the orders of the Commission would afford an easy means for its evasion, and might result in its practical annulment."

In Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426, Mr. Justice White pointed out instances of how the survival of the right of a shipper to sue a carrier on the ground that the published rate was unreasonable,

would deprive the interstate commerce act of its efficacy; so it may be shown here that the survival of the right to recover in a state court a sum in excess of the amount on which the rate was based, would render nugatory the provisions of the act which require compliance with the published rate and equality among shippers, and prohibit rebates and discrimination.

Suppose that on the day that Croninger shipped his ring from Cincinnati to Augusta, and obtained a rate of twenty-five cents, another shipper shipped a similar ring, declaring its true value, and was charged the published rate of fifty-five cents. Under the rule adopted by the Kentucky court each shipper may recover full value in case of loss, and the dishonest shipper gets the benefit of a lower rate.

Suppose that on the day that Croninger made his shipment a shipper in New York shipped a ring worth $125.00 to Augusta without disclosing the value, and suppose that the rates from New York to Augusta were the same as the rates from Cincinnati to Augusta. In case the New York Shipment were lost, under the established law of that state the recovery would be limited to $50.00, whereas Croninger recovers $125.00 in the Kentucky court. The filing and publication by the carrier of the same rate between New York and Augusta, and Cincinnati and Augusta, shows that the elements which determine the two rates are similar; the circumstances and conditions surrounding the two shipments are so similar that the lawful rates are identical; but discrimination results by the application of varying state laws.

Suppose that a carrier under section six which requires the filing of its rates and schedules together with a statement

of "all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect or determine any part or the aggregate of such aforesaid rates, fares and charges or the value of the service rendered to the passenger, shipper or consignee," should file a statement that in case of loss of a shipment of the kind and size of Croninger's it would pay only $50.00 when the shipment originated at New York, but would pay $125.00 when it originated at Cincinnati, can it be doubted that the rule would be invalid under section three of the act, which makes it unlawful for the carrier "to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality?" Other circumstances and conditions which go to the fixing of a rate being similar, the mere fact of residence in different states would not justify the carrier in discriminating in rates charged, service rendered or basis of settlement in case of loss. But state legislatures or courts have no power by statute or judgment to force carriers to grant certain shippers discriminative privileges, which it would be illegal under federal law for the carrier to grant voluntarily.

Suppose that the valuation clause were held binding in the courts of every state except Kentucky. Shippers located in other states, realizing that recovery in case of loss would be limited to the value on which the rate is based would declare the true value and pay the legal rate. Shippers in Kentucky, on the other hand, knowing that they could obtain recovery of the actual value in the courts of that state, would refuse to declare the true value and would not be required to pay the rate based on such value. The result would

be a general discrimination in favor of Kentucky shippers over their competitors in other states.

We submit that a public policy of the United States of uniform application is necessarily established by the acts to regulate commerce, which is inconsistent with the power formerly existing in the states to compel an interstate carrier to answer for more than the amount on which the rate was based to a shipper who has secured an illegally low rate.

II.

Initial carriers are not subject to the liability imposed by varying state laws for loss or damage to interstate shipments, because Congress has assumed possession of the domain of such liability.

We refer particularly to the Carmack Amendment of June 29, 1906, whereby the following was added to section twenty of the Interstate Commerce Act:

> "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

> That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment or transcript thereof."

Pennsylvania Railroad Co. vs. Hughes, 191 U. S. 477, was somewhat analogous to this case on the facts involved, but did not present to the court the questions involved here. It was an action in the Court of Common Pleas of Philadelphia to recover for injuries to a horse shipped from Albany, New York, to Cynwyd, Pennsylvania, under a bill of lading or contract dated August 10, 1900, which contained the following provision:

> "That said shipper, or the consignee, is to pay freight thereon to the said carrier at the rate of—— per——, which is the lower published tariff rate, upon the express condition that the carrier assumes liability on the said live stock to the extent only of the following agreed valuation, upon which valuation is based the rate charged for the transportation of the said animals, and beyond which valuation neither the said carrier nor any connecting carrier shall be liable in any event, whether the loss or damage occur through the negligence of the said carrier or connecting carrier, or their employees or otherwise.
>
> If horses or mules—not exceeding one hundred dollars each."

The shipper paid the rate based on the lower valuation of one hundred dollars for each horse and signed the bill of

lading, which recited that he had the option of shipping at a higher rate under the company's tariffs, and of receiving the security of full common-law liability in case of loss. The horse was injured while in custody of defendant as the connecting carrier and the jury returned a verdict for $10,000.00 on which a judgment was affirmed by the Supreme Court of Pennsylvania. On writ of error from this court it was argued for plaintiff in error that "the common law of the United States as interpreted by this court permits carriers, in the course of interstate commerce, in consideration of making a reduced rate, to limit their liability to a designated valuation," citing Hart vs. Pennsylvania Railroad Co. 112 U. S. 331; and that an entire contract of interstate shipment is not subject to several inconsistent public policies so as to permit a state court to apply a different rule of public policy invalidating such contract. Mr. Justice Day, delivering the opinion of the court, said, at p. 487:

> "In refusing to limit the recovery to the valuation agreed upon, did the state court deny to the company a right or privilege secured by the interstate commerce law? It may be assumed that under the broad power conferred upon Congress over interstate commerce as defined in repeated decisions of this court, it would be lawful for that body to make provision as to contracts for interstate carriage, permitting the carrier to limit its liability to a particular sum in consideration of lower freight rates for transportation. But upon examination of the terms of the law relied upon we fail to find any such provision therein. . . There is no sanction of agreements of this character

> limiting liability to stipulated valuations, and, until Congress shall legislate upon it, is there any valid objection to the State enforcing its own regulations upon the subject, although it may to this extent indirectly affect interstate commerce contracts of carriage."

On the authority of Chicago, Milwaukee, etc., Ry. Co. vs. Solan, 169 U. S. 133, the judgment was affirmed.

It will be noted that Pennsylvania R. R. Co. vs. Hughes, did not involve the question of a rate, or several varying rates, filed with the Commission, based on value, but merely a contract whereby the shipper was given the option, of paying what was alleged in the contract to be the "higher rate," or of paying the lower rate in consideration of a release of liability for loss. The contract showed on its face that the parties recognized the "released valuation" as not the true value. The railroad company did not rely on the inviolability of its rates under the interstate commerce act, but only on its contract. The only error assigned as raising a federal question was (p. 486):

> "III. The learned court below erred in entering judgment in conflict with the act of Congress of February 4, 1887, entitled 'An act to regulate commerce.' Section one of said act clearly provides that where the transportation is from one State to another, under a through bill of lading, its provisions shall be carried out, unless it be in conflict with a statute of the State in which it may be performed, or in conflict with the policy of the United States as laid down in the federal courts, and that, as the contract was valid in the place where made, and, as there is no statute in Pennsylvania prohibitory of an agreed valuation to establish

> a rate, and as it is consistent with the policy of the United States as declared by the federal courts, the judgment should have been for the valuation mentioned in the contract."

Numerous changes have been made in the interstate commerce act since the Hughes case. That part of section 1 which read:

> "the term 'transportation' shall include all instrumentalities of shipment or carriage,"

was amended by the Act of June 29, 1906, c. 3591, 34 Stat. 584, as follows:

> "the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and rates applicable thereto."

That part of section 6 of the act of 1887 as amended in 1889 which read:

> "The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately terminal charges and any rules or regulations which in any wise change, affect,

> or determine any part or the aggregate of such aforesaid rates, fares and charges;"

was amended by the act of 1906 as follows:

> "The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper or consignee. . . . The provisions of this section shall apply to all traffic, transportation, and facilities defined in this act."

The Elkins Act and the Carmack Amendment of section 20 are also subsequent to the transactions involved in the Hughes case.

The main purpose of the Carmack Amendment was to give the holder of the bill of lading, which the carrier to whom the goods were delivered for transportation is required to issue, a right of action against such carrier for loss caused by connecting carriers, with a right in the initial carrier to recover over against the connecting carrier.

Atlantic Coast Line vs. Riverside Mills, 219 U. S. 186, was an action to recover from the Atlantic Coast Line the value of goods delivered to it at a point on its line in the State of Georgia for transportation to points in other states. The goods were safely delivered by the Atlantic Coast Line

to connecting carriers, and were lost while in the care of such carriers. The bill of lading on which the shipment was made contained the provision that "no carrier shall be liable for loss or damage not occurring on its portion of the route."

The court held that section 20 of the Act (Carmack Amendment) was constitutional and that it imposed upon the initial carrier in favor of the shipper, liability for loss on the line of the connecting carrier. The opinion of the court delivered by Mr. Justice Lurton, points out the purposes of the section, and the abuses which it was intended to remedy. At page 203 he said:

> "The requirement that carriers who undertook to engage in interstate transportation, and as a part of that business held themselves out as receiving packages destined to places beyond their own terminal, should be required as a condition of continuing in that traffic to obligate themselves to carry to the point of destination, using the lines of connecting carriers as their own agencies, was not beyond the scope of the power of regulation. The rule is adapted to secure the rights of the shipper by securing unity of transportation with unity of responsibility."

The right thus created was not a right unknown to existing law (See Missouri, Kansas & Texas Ry. Co. vs. McCann, 174 U. S. 580, dealing with a Missouri statute from which the Carmack Amendment was copied), but the effect of the enactment was to create a new federal right of uniform application in interstate commerce, and superseding state law on the subject.

In Southern Pacific Ry. Co. vs. Crenshaw, in the Court of Appeals of Georgia, 63 S. E. 865, which was an action by

a shipper against the initial carrier for loss on the line of a connecting carrier it was held that that part of section 20 which provides:

> "nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action he has under existing law,"

left jurisdiction in the state courts to entertain the action but that the only liability which the state court could enforce was that imposed by the federal law. The court said, at 68 S. E. 868:

> "That there may be no misunderstanding let it be stated that it is clearly understood here that neither of these provisions is adequate to reserve to the state courts any jurisdiction, the exercise of which would be inconsistent with the purposes of the legislation or would tend to make its provisions less uniform or effective or would encroach upon the paramount power of the Congress to provide for the enforcement of the prescribed regulations in the particular manner deemed by that body to be most expedient. See T. & P. Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426."

In the course of the opinion the purposes of the section were further elucidated as follows:

> "Indeed, we have no doubt that at the time when the provision declaring the liability of the initial carrier in interstate shipments was inserted in the act it was within the legislative mind that it would be expedient to prescribe a uniform rule on the subject binding on state and federal courts alike. Until Congress spoke the states were free to give to such transactions varying liabilities. The courts of some

states recognized the rule in the Muschamp case, supra, others did not. Some states allowed carriers to exempt themselves from all or a part of the common law liability by rule, regulation, or contract, others did not. The federal courts sitting in the various states were following the local rule, a carrier being held liable in one court when under the same state of facts he would be exempt from liability in another. Hence this branch of interstate commerce was being subjected to such a diversity of legislative and judicial holding that it was practically impossible for a shipper engaged in a business that extended beyond the confines of his own state or for a carrier whose lines were extensive to know without considerable investigation and trouble, and even then oftentimes with but little certainty what would be the carrier's actual responsibility as to goods delivered to it for transportation from one state to another. The congressional action has made an end to this diversity, for the national law is paramount and supersedes all state laws as to the rights and liabilities and exemptions created by such transactions. This was doubtless the purpose of the law; and this purpose will be effectuated and not impaired or destroyed by the state court's obeying and enforcing the provisions of the federal statute where applicable to the facts in such cases as shall come before them. It may be said in passing that the liability imposed against the initial carrier does not (according to the express terms of the act) prevent the owner of the goods from proceeding ex delicto against the last or connecting carrier for loss or damage to the goods where such carrier would be liable under the existing laws."

But the right of the shipper to recover from the initial carrier for loss on the line of the connecting carrier was not the only federal right created by the law. In addition, the section creates a federal right of action by the holder of the bill of lading against the carrier issuing the bill for loss or damage "caused by it." Such right, of course, existed under the common or statute law of all states prior to the statute, but nevertheless the statute creates the right as a federal right; so that if a state should pass a law taking away or limiting the shipper's right to recover from the carrier for a loss caused by it as to an interstate shipment, the holder of the bill of lading could pursue his federal right and enforce it in this court if a state court denied it. That being true, the right of action which the "lawful holder" enforces to recover from the initial carrier for loss or damage whether caused by the initial or a connecting carrier on an interstate shipment, must be the right created by the federal statute. Congress has "taken possession of the domain" of actions by the lawful holder against the initial carrier, and in view of such action by Congress, the rules of state law, common or statutory, on the same subject, must give way. If the lawful holder of the bill of lading for interstate transportation sues the initial carrier for liability caused by it, a liability imposed by the act of Congress, it is not conceivable that the carrier could be permitted to defeat the liability imposed by the act of Congress, by showing that the law of the forum or of the state where the bill of lading was issued, imposed a lesser or no liability on the carrier; nor on the other hand can the holder enforce against the carrier a greater or different lia-

bility imposed by state law, than that imposed by the act of Congress. It is unnecessary to review the decisions of the court which hold that state action is inhibited when Congress has spoken. Three late decisions of the court are sufficient to illustrate the present state of the law.

In Northern Pacific Ry. Co. vs. State of Washington, 222 U. S. 370, involving the application of the act of Congress known as the "Hours of Service" law to a transaction whereby the Northern Pacific Ry. Co. in operating a train on its road in the State of Washington, but which was engaged in hauling interstate freight, permitted some of the train crew to remain on duty more than sixteen consecutive hours. The act of Congress was approved March 4, 1907, but contained a provision that it was not to take effect and be in force until one year after its passage. The transaction occurred on July 3 and 4, 1907. On June 12, 1907, the law of the State of Washington regulating hours of service of railway employes became effective, and suit was instituted by the Attorney-General of the State against the railroad company to recover penalties for violation of the state law. The state court held that the state law was applicable to the interstate commerce in question because of the provision of the act of Congress that it should not take effect until one year after its passage. This court held that the state law could have no application to the transaction. The Chief Justice delivering the opinion of the court, said, at page 378:

> "But we are of opinion that this view is not compatible with the paramount authority of Congress over interstate commerce. It is elementary, and such is the doctrine announced by the cases to which the

court below referred, that the right of a state to apply its police power for the purpose of regulating interstate commerce, in a case like this, exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject or manifests its purpose to call into play its exclusive power. This being the conceded premise upon which alone the state law could have been made applicable, it results that as the enactment by Congress of the law in question was an assertion of its power, by the fact alone of such manifestation that subject was at once removed from the sphere of the operation of the authority of the state. To admit the fundamental principle and yet to reason that because Congress chose to make its prohibitions take effect only after a year, the matter with which Congress dealt remained subject to state power, is to cause the act of Congress to destroy itself; that is, to give effect to the will of Congress as embodied in the postponing provision for the purpose of overriding and rendering ineffective the expression of the will of Congress to bring the subject within its control—a manifestation arising from the mere fact of the enactment of the statute."

Southern Ry. Co. vs. Reid, 222 U. S. 424, was a writ of error to reverse a judgment of the Supreme Court of North Carolina, by which a shipper was permitted to recover penalties against the railroad company for its refusal to receive an interstate shipment of freight, under a North Carolina statute which required railroads under penalty to receive freight "whenever tendered." The railroad company refused to receive and carry the freight because it had not established and filed with the Interstate Commerce Com-

mission a through joint rate for the route over which the freight tendered would have to pass, and it was contended on behalf of the railroad company that to engage in the transportation without having filed the rates would constitute a violation of the Interstate Commerce Act. In reversing the judgment of the Supreme Court of North Carolina against the railroad company, Mr. Justice McKenna, delivering the opinion, said, at page 440:

> "There is scarcely a detail of regulation which is omitted to secure the purpose to which the Interstate Commerce Act is aimed. It is true that words directly inhibitive of the exercise of state authority are not employed, but the subject is taken possession of."

And at page 442:

> "By these provisions Congress has taken possession of the field of regulation, with the purpose, which we have already pointed out, to keep under the eye and control of the Commission the rates charged and the action of the railroad in regard to them, to secure their reasonableness, and to secure their impartial application. The statute of North Carolina conflicts with these requirements. What they forbid the carrier to do, the statute requires him to do, and punishes disobedience by successive daily penalties."

In Southern Ry. Co. vs. Reid & Beam, 222 U. S. 444, a judgment based on the same North Carolina statute was also reversed. As shown by the opinion (p. 447), the Supreme Court of North Carolina held that the statute did not burden interstate commerce and that "in the absence of inhibitive Congressional legislation, or of interfering action on the part of the Interstate Commerce Commission, the statute in

question is a valid regulation and an indirect and reasonable enforcement of the duties incumbent on defendant as a common carrier." This court held that:

> "there need not be directly 'inhibitive Congressional legislation,' but Congressional legislation which occupies the field of regulation and thereby excludes action by the state."

The proviso "that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law," cannot be construed so as to leave in existence rights of action under state law which apply to the same subject matter. "To admit . . . that the matter with which Congress dealt remained subject to state power, is to cause the act of Congress to destroy itself," as was said in Northern Pacific Ry. Co. vs. State of Washington, 222 U. S. 370, 378. The proviso must therefore be limited as saving rights of action under the state law, outside and not within the field which Congress has occupied. As said by the Court of Appeals of Georgia in Southern Pacific Co. vs. Crenshaw, 168 S. E. 865, "the liability imposed against the initial carrier does not (according to the express terms of the act) prevent the owner of the goods from proceeding ex delicto against the last or connecting carrier for loss or damage to the goods where such carrier would be liable under existing laws." This, we submit, is the extent to which the proviso can save rights of action, under existing law, so as to make it consistent with the federal right of action created by the main clause. The proviso does not preserve the right to impose liability upon the initial carrier, whether for loss caused by it or by a connecting carrier, in accordance with varying state laws.

III.

Defendant's liability under section 20 of the Interstate Commerce Act does not exceed Fifty Dollars, and the judgment of the state court for more than that amount deprives defendant of a federal right.

In the course of the opinion in Pennsylvania R. R. Co. vs. Hughes, 191 U. S. 477, 486, Mr. Justice Day said:

> "The federal courts in cases of which they have jurisdiction will doubtless continue to follow the rule of the Hart case, but the highest court of Pennsylvania may administer the common law according to its understanding and interpretation of it, being only amenable to review in the Federal Supreme Court where some right, title, immunity or privilege, the creation of the federal power, has been asserted and denied."

Hart vs. Penn. R. R. Co., 112 U. S. 331, was an action instituted in a state court in Missouri to recover damages for breach of a contract to transport certain horses from Jersey City to St. Louis under a bill of lading signed by the shipper, agreeing on a valuation of the property carried, with the rate of freight based on the condition that the carrier assumed liability only to the extent of the agreed valuation. The horses were killed by negligence of the railroad company, and in the United States circuit court, to which the case had been removed, the railroad company admitted liability to the amount of the valuation on which the freight rate was based. It was held that no greater liability could be imposed. In delivering the opinion of the court Mr. Justice Blatchford said that it must be presumed in the absence of evidence to the contrary that "as the rate of freight

expressed is stated to be on the condition that the defendant assumes a liability to the extent of the agreed valuation named, the rate of freight is graduated by the valuation" (p. 337), a point which is not matter of presumption in the present case. He said (p. 337); "The rate of freight is indissolubly bound up with the valuation."

It was recognized under the rule of the common law and prior decisions of the court that a common carrier "cannot stipulate for exemption from the consequences of his own negligence or that of his servants" (p. 338). But it was said (p. 340):

> "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practised on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

At p. 343 he said:

> "The distinct ground of our decision in the case at bar is, that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. Squire vs. New York Central R. R. Co., 98 Mass. 239, 245, and cases there cited."

In the course of the opinion, Mr. Justice Blatchford referred to some of the English cases and quoted the language of Lord Mansfield, in Gibbon vs. Paynton, 4 Burrows, 2298, that:

> "His warranty and insurance is in respect of the reward he is to receive, and the reward ought to be proportionable to the risque. If he makes a greater warranty and insurance, he will take greater care, use more caution, and be at the expense of more guards or other methods of security; and, therefore, he ought, in reason and justice, to have a greater reward."

At common law, while the right of the carrier to inquire as to the value of a package in order to determine his freight was always recognized, it was held in the absence of such inquiry, that the shipper was under no obligation to disclose the value. But as early as 11 G. 4, and 1 W. 4, c. 68,

it was provided by statute in England that a carrier should not be liable beyond ten pounds unless at the time of making the shipment, the shipper, if the goods were of greater value, should so declare to the carrier, and pay accordingly.

Prior to the statute of 11 G. 4, and 1 W. 4, c. 68, it had been the general custom in England for carriers to give notice by advertisement and posters that they would not be responsible for goods of greater value than five pounds, and in some cases ten pounds, unless the value was declared at the time of shipping, and the rate paid accordingly, and it was uniformly held by the courts that a carrier who had given such notice would not be liable at all, even for the five pounds or the ten pounds, to a shipper who shipped a package of greater value, as an ordinary package, without disclosing its real value.

Gibbon vs. Paynton, 4 Burr. 2298 (1769).

Clay vs. Willan, 1 H. Bl. 298 (1789).

Izett vs. Mountain, 4 East, 371 (1803).

Batson vs. Donovan, 4 B. & Ald. 21 (1820).

Under the statute 11 G. 4, and 1 W. 4, c. 68, which required the shipper to give notice of the value if the value exceeded ten pounds, it was held that the carrier is not liable, even if the loss happens by the gross negligence of his servants, where a parcel of greater value than ten pounds is delivered without declaring its value and paying the rate according to the value.

Hinton vs. Dibbin, 2 Ad. & E. N. S., 646.

The rule of the Hart case has been followed by the federal courts in many cases, among them;

Kidd vs. Greenwich Ins. Co., 35 Fed. 351.

Calderon vs. Atlas S. S. Co., 64 Fed. 874.
Calderon vs. Atlas S. S. Co., 69 Fed. 574.
The Kensington, 88 Fed. 331.
Jennings vs. Smith, 106 Fed. 139.
Saunders vs. Southern Ry., 128 Fed. 15.
Macfarlane vs. Adams Express Co., 137 Fed. 982.
Missouri, etc., Ry. of Texas vs. Patrick, 144 Fed. 632.
Taylor vs. Weir, 162 Fed. 585.
Blackwell vs. Southern Pac. Co., 184 Fed. 489.
Pierce Co. vs. Wells Fargo Co., 189 Fed. 561.

This court approved the rule in Liverpool Steam Co. vs. Phenix Ins. Co., 129 U. S. 397, 442; Calderon vs. Atlas S. S. Co., 170 U. S. 272, and The Kensington, 183 U. S. 263. In the Calderon case the bill of lading was held invalid because it undertook to exempt the carrier from any liability for packages over the value of $100 each. In the Kensington case the limitation was held invalid because the alternative offered to the passenger of a higher valuation for a higher freight was that he should ship his baggage under a bill of lading. This would have brought it within the Harter Act, which relieves the carrier from liability for errors of navigation or mismanagement.

Without citing the numerous cases in state courts which follow the Hart case, we note that the states of Minnesota, Wisconsin and Ohio, which were cited in the opinion in the Hart case (p. 342) as supporting a contrary rule, now expressly adopt the rule, as appears from the following cases decided since the Hart case by the courts of last resort in those states.

Alair vs. Railroad Company, 53 Minn. 160.

Douglas Co. vs. Railway Co., 62 Minn. 288.
O'Malley vs. Railway Co., 86 Minn. 380.
Loeser vs. Chicago, M. & St. P. Ry. Co., 94 Wis. 571.
Ullman vs. Chicago, etc., Ry. Co., 112 Wis. 150.
Baltimore & Ohio Ry. Co. vs. Hubbard, 72 Ohio St. 302.

That portion of the Carmack Amendment which provides, "no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed," does not forbid the application of the principle of the Hart case in determining the extent of the liability imposed by the section. While the main purpose of the provision was to prevent the initial carrier from contracting against its liability for loss caused by the connecting carrier (Atlantic Coast Line vs. Riverside Mills, 219 U. S. 186), it may be admitted that the provision is co-extensive with the section, and also invalidates a contract whereby the initial carrier seeks to avoid the liability imposed for loss caused by it. But the liability imposed is not greater than the value which the article has for the "purposes of the contract of transportation," where the contract "is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation," as in the Hart case. A fortiori the liability imposed is not greater than the value on which the published rate is based, where the rate is based on value, which the shipper is required to declare for the purpose of fixing the rate, as in the present case.

Bernard vs. Adams Express Co., 205 Mass. 254, 91 N. E. 325, was an action for loss of a package of the value of $154, which the express company received under circumstances similar to those in this case and for which it gave a similar bill of lading. The trial judge limited the recovery to $50, while plaintiff claimed he was entitled to recover the full value under the terms of the Carmack Amendment. The supreme court said:

> "Under the decisions in this commonwealth and in the Supreme Court of the United States, there is no doubt that, before the enactment of this law, the plaintiff, upon the facts and findings in the present case, would be estopped from claiming more than $50 as the value of the package. Graves vs. Lake Shore & Michigan R. R., 137 Mass. 33, 50 Am. Rep. 282; Hill vs. Boston Co., 144 Mass. 284, 10 N. E. 836; Cox vs. Central Vermont Ry., 170 Mass. 129, 136, 49 N. E. 97; Graves vs. Adams Express Co., 176 Mass. 280, 57 N. E. 462; Hart vs. Pennsylvania R. R. Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717. These decisions are founded on the common law, as it is interpreted in this commonwealth, in the federal courts, and in the courts of many of the states. The question is whether the statute quoted above has changed the law in its application to the facts before us.
>
> One obvious purpose of the Congress was to extend the provisions of the common law so as to make a common carrier receiving property for transportation liable for loss, damage or injury to it, not only while it is in transit over his own lines, but while it is in the hands of a connecting carrier. In Greenwald vs. Weir, 130 App. Div. 696, 115 N. Y. Supp.

311, it is said that this last is the only liability imposed by the statute. Although the liability stated is made statutory by the enactment, the statement of it in the words 'for any loss, damage or injury to such property, caused by it or by any common carrier, railroad or transportation company, to which such property may be delivered, or over whose line or lines such property may pass,' includes nothing beyond the liability at common law, except that for the undertaking of other carriers into whose possession the property may come. The liability is only for loss, damage or injury 'caused' by the carrier, which, broadly interpreted, includes that resulting from neglect as well as that due to a positive act. It does not include the liability as an insurer against loss for which the common carrier is not culpably chargeable. The liability stated is for every kind of positive misconduct of the carrier affecting the property, and for negligence from lack of care or effort. Now what is the prohibition imposed upon the carrier by the statute? It is from exempting one's self from this liability by a contract, receipt, rule or regulation; in other words, we have a statutory declaration that a contract of exemption from liability for negligence is against public policy and void. This is no more than the courts have frequently declared in proceedings at common law.

But such a contract as we are considering in this case is not an exemption from liability for negligence in the management of property, within the meaning of the statute. It is a contract as to what the property is, in reference to its value. The purpose of it is not to change the nature of the undertaking of the common carrier, or limit his obligation in the care

and management of that which is intrusted to him. It is to describe and define the subject-matter of the contract, so far as the parties care to define it, for the purpose of showing of what value that is which comes into the carrier's possession, and for which he must account in the performance of his duty as a carrier. It is not in any proper sense a contract exempting him from liability for the loss, damage or injury to the property, as the shipper describes it in stating its value for the purpose of determining for what the carrier shall be accountable upon his undertaking, and what price the shipper shall pay for the service and for the risk of loss which the carrier assumes. The principle was clearly pointed out in Graves vs. Lake Shore & Michigan Southern R. R., 137 Mass. 33, 50 Am. Rep. 282. The cases cited above do not go upon the ground that there is a contract of exemption from liability for negligence, but upon the ground that the contract relates directly to the elements and quality, as to value, of that which is to be transported."

In Greenwald vs. Barrett, 199 N. Y. 170, 92 N. E. 218, which was a similar case, the same conclusion was reached. The opinion of the court of appeals says, at p. 174:

"To defeat the limitation of liability sought to be effected by this clause in the express receipt, the plaintiffs rely upon a provision contained in the act of Congress commonly known as the Hepburn Act, being an amendment to section 20 of the interstate commerce act, passed June 29, 1906, c. 3591, 34 Stat. 594 (U. S. Comp. St. Supp. 1909, p. 1166). . . .

The question to be determined upon this appeal is whether this federal legislation forbids an express

company from making a contract with a shipper such as we have quoted from the receipt given to the plaintiffs. If that question is answered in the affirmative, the plaintiffs were entitled to recover whatever they could prove to have been the actual value of the property shipped. If it is answered in the negative, their recovery must be limited to the agreed value of the property under the terms of the receipt.

The purpose of the provision which we have quoted from the Hepburn Act was obvious. It was to render the initial carrier in the case of interstate transportation over connecting lines liable to the lawful holder of its receipt or bill of lading for any loss or injury to the property shipped, whether such loss or injury occurred after the goods had passed out of the hands of the initial carrier or not; and furthermore to prevent interstate carriers from exempting themselves from liability for the loss of property or damage thereto after it had passed into the hands of another carrier to be transported to its destination. The language of the enactment does not disclose any intent to abrogate the right of common carriers to regulate their charges for carriage by the value of the goods, or to agree with the shipper upon a valuation of the property carried. It has been the uniform practice of transportation companies in this country to make their charges dependent upon the value of the property carried, and the propriety of this practice and the legality of contracts signed by the shipper agreeing upon a valuation of the property were distinctly upheld by the Supreme Court of the United States in Hart vs. Penn. R. R. Co., 112 U. S. 331."

Travis vs. Wells, Fargo & Co., 79 N. J. L. 82, was an action to recover for loss of a trunk delivered by plaintiff to

defendant for interstate transportation and lost on the line of a connecting carrier. The bill of lading contained a clause limiting defendant's liability to $50 unless a greater value is stated. The trial court ruled that the action was maintainable and the clause limiting liability void under the Carmack Amendment. The supreme court reversed the judgment, saying (p. 86):

> "The statute means that instead of a common carrier being liable as at common law for any loss caused by itself, it shall not only be liable for such loss, but for any loss caused by a connecting carrier to which it has delivered its goods. There was no intention to impose upon the receiving carrier any additional liability for goods lost by it, and that the loss under the statute, as before, is the loss of goods of such value as the carrier has bargained to carry, and is, under his contract, to be paid for carrying. It was not intended to abrogate the right to limit liabilities for loss in accordance with the amount paid for carriage, etc."

P. C. C. & St. L. Ry. Co. vs. Mitchell, in the Supreme Court of Indiana, 91 N. E. 735, was an action to recover against the initial carrier for loss on the line of a connecting carrier. In respect to that part of the bill of lading which attempted to limit the liability of the initial carrier to its own line, the court held that section 20 of the Interstate Commerce Act was applicable, invalidating the provision. In regard to other provisions of the bill of lading, limiting the liability as to the amount, etc., the court said:

> "We are not to be understood as holding that there may be no limitation of liability, nor does the

Interstate Commerce Act or the construction under it so declare. The common law right to contract with respect to the value of an article to be transported upon the character and value of which a rate may depend and the right to contract against loss beyond the carrier's control are unaffected by the Inter-state Commerce Act, though the contract must be fairly made upon a sufficient consideration after the shipper has been given an opportunity to choose between the common law right and rate, and the special contract rate and limited liability. Burns' Ann. St. 1908, sec. 3919; Cleveland, etc., Co. vs. Hollowell (1909), 172 Ind. 466, 88 N. E. 680; Lake Erie Co. vs. Holland, 162 Ind. 406, 69 N. E. 138, 63 L. R. A. 948; Travis vs. Wells Fargo Co., supra; Greenwald vs. Weir, supra; Hart vs. Penna. Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; In re Released Rates (1908), 13 Interst. Com. R. 550; Elliott on Railroad, 1504, 1510. For the like reason, this right would also extend to the question here urged as to the contract limiting the liability to the value of the apples at the place and time of shipment, instead of the place of delivery as at common law. Chicago Co. vs. Katzenbach, 118 Ind. 178, 20 N. E. 709."

In Larsen vs. Oregon Short Line R. Co., in the Supreme Court of Utah, 110 Pac. 983, the court said:

"Nor can we agree with counsel for appellant that the contract is forbidden, and therefore void by reason of what is contained in Act Feb. 4, 1887, c. 104, sec. 20, 24 Stat. 386 (U. S. Comp. St. 1901, p. 3169), as amended by Act June 29, 1906, c. 3591, sec. 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1909, p. 1163), and as found in section 6440 of Pierce's United

> States Code of 1910. It is clear that the provisions of the section just referred to were not intended to cover contracts like the one in question. . . . . We can see no good reason why a shipper should not be bound by a contract if fair and reasonable, and, when fairly entered into, in which he agrees that, in consideration of a reduction of the freight charges, the carrier shall be released from liability in case of loss except for the value agreed upon. No doubt if such an agreement were entered into for ulterior purposes, or if based upon fraud or misrepresentation of any kind, and such an issue were presented and sustained, no court would enforce such a contract. In the absence of any evidence involving bad faith, and where the contract is neither opposed to public policy nor prohibited by statute, the courts cannot declare it void."

The Harter Act (27 Stat. 445) provides: "That it shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant or agreement whereby it, he or they shall be relieved from liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect, etc."

In Calderon vs. Atlas S. S. Co., 64 Fed. 874, it was held on the authority of Hart vs. Railroad Co., 112 U. S. 331, that a clause in an ocean bill of lading which provided "the

carrier shall not be liable . . . for goods of any description which are above the value of $100 per package, unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made," was not in violation of the Harter Act. In the court of appeals this judgment was affirmed (Calderon vs. Atlas Steamship Co., 69 Fed. 574), on the ground that the stipulation was a reasonable and valid limitation on the carrier's liability. In this court (Calderon vs. Atlas Steamship Co., 170 U. S. 272), Mr. Justice Brown, delivering the opinion, approved the Hart case as applicable to an ocean bill of lading governed by the Harter Act, but held the principle inapplicable only because the true meaning of the exemption clause was to relieve the carrier from all liability for packages worth more than $100.

Many states which have statutory provisions restricting the right of common carriers to limit their liability by contract, nevertheless apply the rule of the Hart case.

A Michigan statute provides that "No such company shall be suffered to lessen or abridge its common law liability as a common carrier, unless by agreement to be signed by both parties thereto" (Compiled Stat. 1897, sec. 6239). But it is held by the Supreme Court of Michigan in D'Arcy vs. Adams Express Company, 162 Mich. 363:

> "Where the consignor of goods by express fails to place a value on the shipment, as called on to do by the bill of lading filled out by him, the alternative provision thereof limiting the value to $50 will prevent any further recovery."

A Minnesota statute (Revised L. 1905, Sec. 2008) provides:

> "The liability of common carriers at common law with reference to property in their custody shall not be limited by contract or otherwise, except as stated in their published classification schedules. Such liability must include absolute responsibility for the acts of their agents in reference to such property."

Nevertheless the rule of the Hart case is given full effect by the courts of that state; Alair vs. Railroad Company, 53 Minn. 160; Douglas Company vs. Railway Company, 62 Minn. 288.

Illinois and South Carolina have similar statutes but both follow the rule of the Hart case; Oppenheimer vs. United States Express Co., 69 Ill. 62 (cited in the Hart case); Johnstone vs. Richmond & D. R. Co., 39 S. C. 55.

While it is indicated by opinions of the courts of other states that a contrary construction of similar statutory provisions has been adopted, we submit that such construction is not sound and should not be applied to the federal statute here involved.

The federal liability imposed on the initial carrier, as regards the amount of the liability and irrespective of the fact that liability is imposed on it for loss on the line of the connecting carrier, is the common law liability formerly imposed on carriers by state law; and the proviso against contracts exempting carriers from such liability is no stricter than the common law rule recognized in the Hart case, that a contract exempting from liability for negligence is invalid. This is the effect of the construction placed on the act by the Supreme Courts of Massachusetts and New Jersey and the Court of Appeals of New York. To construe the section

as invalidating an agreement fairly entered into, fixing the value of the goods for the purposes of transportation, with a rate based on such value, would attribute to Congress an intention to abrogate a rule well established in the federal courts and almost all state courts, and substitute as a uniform rule governing interstate shipments one which has the approval of only a small minority of the state courts, and which Mr. Justice Blatchford characterized as "unjust and unreasonable, and repugnant to the soundest principles of fair dealing and of the freedom of contracting" (112 U. S. at 341).

So to construe the section would also be to attribute to Congress an intention to strike down a contract or regulation whereby the interstate carrier undertook to confine his liability to the value accepted by him from the shipper as the true value for the purpose of fixing the rate, according to his tariffs filed under section six of the act. Such construction would also invite the shipper to understate value for the purpose of getting a low rate, and lead to the other abuses which the whole statute was designed to remedy. The purpose of the proviso in so far as it deals with the amount of liability at all, is fully effectuated if it be construed as an enactment of the common law rule invalidating contracts whereby the carrier attempts to relieve itself from the results of its own negligence, and such unreasonable agreements and regulations as were condemned in Calderon vs. Atlas S. S. Co., 170 U. S. 272, and the Kensington, 183 U. S. 263.

It is therefore submitted that the Carmack Amendment to section 20 construed in connection with the other sections

of the act imposes on defendant no liability in excess of the value of the goods as shown by the bill of lading, and being the value on which the rate for carriage was based.

IV.

Plaintiff cannot maintain the action because it is founded on a transaction on his part which is declared to be a fraud on the defendant and a public offense by Acts of Congress.

Not only does the judgment of the Kentucky court render nugatory the general purposes of the interstate commerce acts, but it was based on a transaction expressly prohibited and made a misdemeanor by section 10 of the act, and by the Elkins Act. The history and purpose of these criminal provisions is given in Armour Packing Company vs. United States, 209 U. S. 56, 69, where Mr. Justice Day, delivering the opinion, said:

> "These prosecutions were under the Elkins Act (32 Stat. 847), and the first question argued concerns the construction of that act, as to what constitutes a crime on the part of the shippers so far as obtaining a shipment by some manner of device is concerned, it being the contention of the petitioners that in order to work conviction the shipper must be guilty of some bad faith or fraudulent conduct in the use of the device or obtain the rebate by some intentionally dishonest or underhanded method, concession or discrimination denounced by the act. The history of the act in this feature may be of service in interpreting the meaning of Congress. The act of February 4, 1887, made no provision for criminal offenses against the shippers, but it was provided (Sec. 2, c.

104, 24 Stat. 379) that if the common carrier should directly or indirectly, by any special rate, rebate, or other device, demand, collect or receive, from any person or persons, a greater or less compensation for any service rendered or to be rendered in the transportation of property subject to the provisions of the act, than it charges, demands, collects or receives, etc., from any other person or persons for doing for him or them a like service in the transportation of a like kind of traffic under substantially the same circumstances, such common carrier shall be deemed guilty of unjust discrimination, which by the act was prohibited and made unlawful. And it was made unlawful for a common carrier to deviate from the published schedule of rates, fares and charges. 24 Stat., sec. 6, p. 381, c.104, February 4, 1887.

By the act of March 2, 1889 (25 Stat. 857, sec. 10), the shipper was brought within certain criminal provisions of the law, and one who should knowingly and willfully, by false billing, false classifying, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, with or without the consent or connivance of the carrier, obtain or dispose of property at less than the regular rate established and in force, should be deemed guilty of fraud.

It will be noticed that in these statutes the term device is associated with other words indicative of its meaning, and in the act of March 2, 1889, the shipper, for falsely acting as to weighing, billing, classifying or obtaining the transportation of property at less than the regular rate, or by any other device, was deemed guilty of fraud. In this act the term device, as one of the means of consummating a

fraud, shows the sense in which the term is used by Congress. It was only fraudulent conduct in obtaining transportation at less rates than others, which was denounced by the act, and the imposition aimed at was principally such as might be practiced by the shippers upon the carriers in order to procure the preference.

When we come to the Elkins Act we find the following provisions (32 Stat. 847):

'The willful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons or corporation to offer, grant or give or to solicit, accept or receive any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. Every person or corporation who shall offer, grant, or give or solicit, accept or receive any such rebates, concessions, or discriminations shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than

one thousand dollars nor more than twenty thousand dollars.'

In this act we find punishment by imprisonment abolished, and the shipper and carrier are placed upon the like footing, and it is made unlawful for any person or corporation to offer, grant, solicit, give, or to accept or receive, any rebate, concession or discrimination in respect to transportation of property in interstate or foreign commerce, whereby any such property shall, by any device whatever, be transported for a less rate than that published and filed by such carriers, or whereby any other advantage is given or discrimination practiced. And we find the word device disassociated from any such words as fraudulent conduct, scheme or contrivance, but the act seeks to reach all means and methods by which the unlawful preference of rebate concession or discrimination is offered, granted, given or received. Had it been the intention of Congress to limit the obtaining of such preferences to fraudulent schemes or devices, or to those operating only by dishonest, underhanded methods, it would have been easy to have so provided in words that would be unmistakable in their meaning. A device need not be necessarily fraudulent; the term includes anything which is a plan or contrivance. Webster defines it to be "that which is devised or formed by design; a contrivance; an invention; a project," etc.

This act is not only to be read in the light of the previous legislation, but the purpose which Congress evidently had in mind in the passage of the law is also to be considered.

. . . . . .

The Elkins Act proceeded upon broad lines and

> was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published and posted as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published."

That a transaction which constitutes a violation of these sections cannot be the basis of an action was decided in Ellison vs. Adams Express Co., 245 Ill. 410, in which the facts as stated by the court were:

> "The appellees, at Philadelphia, delivered to the appellant, a common carrier, two packages of merchandise to be carried to Chicago and there delivered, one of the value of $349.95 to John B. Ellison & Sons, the other of the value of $229.50 to Herzka Bros. Receipts were given for the packages, which were written by appellee's clerk on printed blank forms in a book furnished by the appellant. The receipts, except the name of the consignee, were alike, and that for the Ellison shipment reads as follows: 'The company's charge is based upon the value of the property, which must be declared by the shipper—Non-negotiable bill of lading—Adams Express Company, form 268C.—Received from John B. Ellison & Sons, Philadelphia, Pa., Feb. 2, 1907, the property hereinafter described, to be forwarded subject to the terms and conditions of the company's regular form of receipt printed on inside front cover of this book.—Liability limited to $50 unless a

greater value is declared.' On the inside front cover of the book appears the following: 'Terms and conditions of the Adams Express Company's regular form of receipt, subject to which the company agrees to carry the property hereinafter in this book described, to which terms and conditions the shipper hereby agrees and as evidence thereof accepts this book. (1) In consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding $50 unless a greater value is declared, the shipper agrees that the value of said property is not more than $50 unless a greater value is stated herein, and that the company shall not be liable, in any event, for more than the value so stated, nor for more than $50 if no value is stated herein,' and other conditions. On the page containing the receipt was a column for value, in which was stamped, 'Value asked and not given.' Appellees' clerk delivered the packages to the appellant without stating the value of either of them, though he was familiar with the contents of the receipt, knew that the charges for transportation increased with increased valuation and knew that there was an additional charge where the value was over $50. He had been instructed by his employer not to declare the values of goods shipped. Had the true value of the contents of the packages been stated, the transportation charges would have been increased forty cents and thirty cents, respectively. After the goods were carried to Chicago they were destroyed by fire before delivery to the consignees. Packages valued at more than $50 were handled separately and were carried in a car in personal charge of a messenger, while packages of less

value were carried in different cars, which were sealed. If these packages had been valued over $50 they would have gone forward on a different car from that which was burned and would not have been destroyed."

In the course of the opinion the court said:

"It was stipulated that schedules of rates in proper form had been filed with the Interstate Commerce Commission by the appellant prior to the time of these shipments, showing that the rates therein mentioned were based upon a valuation of not exceeding $50 in case of each shipment, and that the shipper is required to declare the value, and when a value in excess of $50 is declared, an additional charge is made as provided in the classification which is a part of the said schedules; that the classification referred to showed additional charges where the value exceeds $50, and that such additional charge, when the rate, based on a valuation of not exceeding $50, exceeds $1 per hundred pounds and is not more than $3, is ten cents for each $100 value or fraction thereof; that the rate stated in said schedules for the carriage from Philadelphia to Chicago of articles of the class including such goods as those sued for, based on a value of not exceeding $50, was $2.25 per hundred pounds, and the charges based on the said rate for the shipment to J. B. Ellison & Sons, Chicago, would be $2.82, and for the shipment to Herzka Bros. would be $3.04.

It is contended that on grounds of public policy the appellees, having been guilty of a willful violation of the act by fraudulently obtaining transportation of the goods at an illegal rate through the suppression of information as to the true value thereof, ought

not to be permitted to recover for their loss an amount greater than that on which the rate for their transportation was based. It is undisputed that the appellees knew that the rate was based on valuation; that they intentionally failed to state the value; that they knew that if the value was not stated the rate would be based on a valuation of $50, and if it was stated truly that the rate would be higher, and that they directed their employe who delivered the goods to appellant not to state the value. It is, therefore, undisputed that the appellees knowingly and willfully obtained transportation of their property at less than the regular established rates, in violation of the statute.

Courts of justice will not assist parties who have participated in a transaction forbidden by statute to assert rights growing out of it. There can be no right of recovery upon a contract which is against good morals, forbidden by law or opposed to public policy. The law will not lend its aid to enforce a demand having its origin in a breach of the law itself. This principle has been illustrated by a multitude of decisions and finds expression in the maxim of the Roman law, which is also recognized wherever the common law prevails: Ex turpi causa non oritur actio."

After noticing prior decisions of the court, the opinion continues:

"It is recognized that from the language of an act or the subject-matter of the legislation and the evil sought to be remedied an intention may be manifested on the part of the legislature to limit the scope of the act to the exaction of a penalty and to relieve

the wrongdoer from the ordinary consequences of a forbidden act, but the general rule is stated that there can be no legal remedy for that which is itself illegal, and that when the statute is silent and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void. The general rule is undoubted which was stated by Lord Mansfield in the case of Holman vs. Johnson, Cowp. 341: 'The principle of public policy is this: Ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act.' No person who has participated in a transaction forbidden by statute will be allowed to assert rights growing out of it. 'Whether the form of action is in contract or in tort, the test in each case is whether, when all the facts are disclosed, the action appears to be founded in a violation of law, in which the plaintiff has taken part.' (Hall vs. Corcoran, 107 Mass. 251). Courts, in refusing to enforce claims arising out of a violation of law, are not moved by a consideration of the supposed rights of either party, but in the maintenance of their own dignity, the public good and the laws of the state. Estate of Smythe vs. Evans, 209 Ill. 376.

The appellees' action, when all the facts are disclosed, is founded upon a contract knowingly entered into in violation of law. Whatever the form of the action, whether in contract or tort, it had its basis in the contract of carriage. The wrong complained of is the breach of the illegal contract by which the appellees put their property into the possession of the appellant. That contract was not only a fraud on the appellant, but an intentional evasion of the Inter-

state Commerce Act, one object of which is to prevent discrimination in the transportation of property between the states. That act requires every carrier subject to its provisions to charge each shipper the same sum for a like and contemporaneous service. It makes unlawful the giving or the receiving of any rebate, concession or discrimination in respect of the transportation of property in interstate commerce by any carrier, whereby such property shall be transported at a less rate than that named in the tariffs published and filed by the carrier. To secure the purposes for which the act was adopted it is made unlawful, as we have seen, and is punishable by fine and imprisonment, for any person, with or without the consent or connivance of the carrier, to obtain transportation for his property at less than the regular rate. There is nothing in the act which indicates an intent to limit the scope of this prohibition to the exaction of the penalty, leaving the contract binding in favor of the party who has knowingly and willfully obtained it against the prohibition of the act. Nor in the subject-matter of the legislation do we find anything to justify a presumption that Congress intended to relieve wrongdoers of the ordinary effect of their acts. Compliance with the requirements of the act by the shipper as well as the carrier is essential to its successful operation, and we cannot presume that Congress intended that the contracts forbidden by it should be valid and should be enforced to the same extent as if there were no prohibition, merely subjecting the offender to the penalty if detected and prosecuted. We see no reason which except this case from the rule that a contract entered into in violation of an express statutory prohibition

cannot be made the basis of an action in a court of justice."

In "In The Matter of Released Rates" (May 14, 1908), 13 I. C. R. 550, No. 933, the Commission after a hearing attended by the representatives of shippers and carriers issued an extensive ruling, in which it considered the question involved here and other similar questions. Among other points it was ruled that when rates are conditioned upon the shippers agreeing that the carriers liability shall be limited to a certain specified value, and "when the shipper has placed upon his goods a specific value, the carrier accepting the same in good faith as their real value, the rate of freight being fixed in accordance therewith, the shipper cannot recover an amount in excess of the value he has disclosed, even when loss is caused by the carrier's negligence" (p. 553).

After citing many cases it is stated that under the Interstate Commerce Act as amended June 26, 1906:

> "It is obvious that a carrier may lawfully establish a scale of charges applicable to a specific commodity and graduated reasonably according to value. The cost of carriage is not the only element in the carrier's charges—a carrier is subject to a certain insurance liability. It would seem proper, therefore, that when its insurance risk is enlarged by reason of increased value of the goods entrusted to it, it may provide for a reasonable increase in its charges. We hold that it is in contravention neither of the letter nor the spirit of the law for the carrier to provide a higher rating for goods of special value than it applies to goods of the same class but of lower value. If it

enforces its tariffs in good faith, endeavoring to give to each shipment the rating which its value requires, the law affords complete protection against the frauds and misrepresentations of the shipper" (p. 560).

On December 10, 1907, the following ruling was issued by the Interstate Commerce Commission. Subject 10974:

"Interstate Commerce Commission.

Washington, December 10, 1907.

Mr. W. B. Biddle,

Third Vice-President, Rock Island Lines,

Chicago.

Dear Sir:

The question of an expression by the Commission concerning the existence of several different classification ratings on the same commodity of different values or shipped under released or common carrier's liability has been given the consideration of the Commission as a whole, and I am authorized to say that in its opinion where a shipper consigns its freight on a declared valuation, thereby securing a lower rate of transportation and later undertakes to collect damages in connection with that shipment on the basis of a higher value than that originally stated, he commits an act that is prohibited in the third paragraph of section 10 of the act to regulate commerce, as amended, viz:

'Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this act, or for whom as consignor or consignee any such carrier shall transport property who shall knowingly and willfully by false billing, false classification, false weighing, false representa-

tion of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court.'

The Commission is further of the opinion that if a carrier recognized in settlement of a claim for damages a valuation higher than that which was the basis of securing the transportation rate, it and its officers would thereby violate the provisions of the law.

Of course, where the carrier quotes different rates for the transportation of the same commodity based on differing declared valuations, the rates and the differences so accorded must be reasonable, and it is not proper that such differences should be sufficiently wide to constitute a discrimination, or an inducement to shippers in order to secure a materially lower rate.

Yours truly,

(Signed) E. E. Clark,
Commissioner.

Jas. V. Mahoney,
Chairman."

Conference Rulings of the Commission, Bulletin No. 5, Issued April 1, 1911, contains the following informal rulings:

"58. Declaring a False Valuation in Violation of Section 10.—Upon an inquiry from a banking house whether it may lawfully declare a value of $5,000 upon a package of negotiable bonds of the market value of $10,000 and pay the express charges on the basis of the declared value, upon the understanding that in case of the loss of the bonds the express company will be responsible only for the amount so declared, it was held that a shipper falsely declaring the value of a package delivered to an express company for transportation violates section 10 of the act. (See Rule 295)."

"295. Rates Based on Value of Merchandise.—Carriers may lawfully establish schedules of charges applicable to a specific commodity and graduated reasonably according to value. When such rates are published shippers are entitled to the rate corresponding to the actual value of the property offered by them for transportation. Shippers are not entitled under such rates to understate the actual value of shipments for the purpose of obtaining the rate applicable upon articles of less value. The valuation stated to carriers should correspond with the actual value as shown by invoices, etc. Shippers misstating the value of property for the purpose of obtaining the rate applicable to property of less value are guilty of misbilling and are subject to prosecution under section 10 of the act to regulate commerce. (See Rule 58)."

In Frank vs. Adams Express Co., Pittsburg Legal Journal, May 20, 1905, O. S. Vol. LV., N. S. XXXVIII (Common Pleas Court No. 1, Allegheny County) plaintiff shipped by express from Pittsburg to New York a package of which the value had been asked and not given, under a receipt iden-

tical with the one in this case. Notwithstanding the established rule in Pennsylvania holding a limitation of the amount of liability invalid where there is a loss by negligence, the court held that section 10 of the Interstate Commerce Act might have the effect of preventing recovery for more than the amount on which the rate was based, saying:

> "One who knows the terms of this contract understands that he is obtaining a rate upon the fifty-dollar valuation, while the real value is greater, and may be guilty of knowingly and willfully obtaining a reduced rate by not giving the correct value. It is not a question as between the parties to the suit. The plaintiff was not asked nor did he give a value, but the law applying to such transaction, it being interstate commerce, declares it to be a misdemeanor to knowingly and willfully declare a less value, to make false representations as to the contents or of weight or by any other device or means obtain a rate less than that established. The contract itself informs a shipper that this is what he is doing.
>
> It is well established that a contract against the policy of the law or of the provisions of a statute cannot be enforced. For these reasons this branch of the case is for a jury."

The rule is firmly established in this court that a transaction in violation of a penal statute cannot be the basis of judicial action unless the statute manifests an intention to limit its scope to the exaction of the penalty.

Miller vs. Ammon, 145 U. S. 421, cited by the Supreme Court of Illinois, in Ellison vs. Adams Express Company, was an action to recover the purchase-price of liquors under a sale in the city of Chicago. As a defense it was pleaded

that the sale was illegal under an ordinance of Chicago which provided a penalty for selling intoxicating liquors without a license. The court, citing many authorities, stated (p. 426):

> "The general rule of law is, that a contract made in violation of a statute is void; and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover."

After quoting the exceptions to this rule, the court said:

> "In the light of these authorities the solution of the present question is not difficult. By the ordinance, a sale without a license is prohibited under penalty. There is in its language nothing which indicates an intent to limit its scope to the exaction of a penalty, or to grant that a sale may be lawful as between the parties, though unlawful as against its prohibitions; nor when we consider the subject-matter of the legislation, is there anything to justify a presumed intent on the part of the law-makers to relieve the wrongdoer from the ordinary consequences of a forbidden act. . . . There is, therefore, nothing in the language of the ordinance or the subject-matter of the regulations, which excepts this case from the ordinary rule that an act done in disobedience to the law creates no right of action which a court of justice will enforce."

In Brown vs. Tarkington, 3 Wall. 377, the court refused to allow a recovery on notes given for money furnished to carry on a bank illegally organized and conducting business.

In Hanauer vs. Doane, 12 Wall. 342, recovery on notes given for stores and supplies furnished the Confederate Government was denied, the court saying, at page 349:

> "The whole doctrine of avoiding contracts for illegality and immorality is founded on public policy. It is certainly contrary to public policy to give the aid of the courts to a vendor who knew that his goods were purchased, or to a lender who knew that his money was borrowed, for the purpose of being employed in the commission of a criminal act, injurious to society or to any of its members."

In Sprott vs. United States, 20 Wall. 459, recovery in the Court of Claims was denied for the proceeds of cotton seized by the government which had originally been sold to the owner and claimant by the Confederate Government to raise funds in aid of the rebellion.

In The Florida, 101 U. S. 37, a libel by the captor against a vessel which he had seized in a neutral port in violation of a rule of international law, the capture having been disavowed by this government, was dismissed. Mr. Justice Swayne, delivering the opinion of the court, said (p. 43):

> "Lastly, the maxim, 'ex turpi causa non oritur actio,' applies with full force. No court will lend its aid to a party who founds his claim for redress upon an illegal act."

In Gibbs vs. Baltimore Gas Company, 130 U. S. 396, the court refused to allow a recovery for services to an agent in negotiating and consummating a contract between gas companies, void because in restraint of trade.

In McMullen vs. Hoffman, 174 U. S. 639, the rule of refusing to enforce an illegal contract was applied to a case where the party setting up the illegality was in pari delicto. Mr. Justice Peckham, delivering the opinion of the court said, at p. 669:

"We must, therefore, come back to the proposition that to permit a recovery in this case is in substance to enforce an illegal contract, and one which is illegal because it is against public policy to permit it to stand. The court refuses to enforce such a contract and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest. It has been often stated in similar cases that the defence is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions. To refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to a minimum. The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined they will be to enter into them. In that way the public secures the benefit of a rigid adherence to the law."

In Harriman vs. Northern Securities Company, 197 U. S. 244, the court refused to allow the recovery of specific stocks transferred to the Northern Securities Company in pursuance of an illegal purpose. Chief Justice Fuller, delivering the opinion of the court, said, at page 296:

"In the present case complainants seek the return of property delivered to the Securities Company pursuant to an executed contract of sale on the ground of illegality of that contract, but the record discloses

> no special considerations of equity, justice or public policy, which would justify the courts in relaxing the rigor of the rule which bars a recovery."

In Continental Wall Paper Co. vs. Voight & Sons Co. 212 U. S. 227, it was held that a vendee of goods purchased from an illegal combination, in pursuance of an agreement illegal under the Sherman Anti-Trust Act, could plead such illegality as a defense. Mr. Justice Harlan, delivering the opinion quoted from McMullen vs. Hoffman, 174 U. S. 639, to the effect that "to refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it, tends strongly towards the reducing of the number of such transactions to a minimum." He said, at page 265:

> "In Bement vs. National Harrow Company, 186 U. S. 70, 87, 88, the court, after referring to that section of the Act of Congress relating to suits by the Attorney-General, and by persons injured in their business or property, said: 'Assuming that the plaintiff is right so far as regards any suit brought under that act, we are nevertheless of opinion that anyone sued upon a contract may set up as a defense that it is a violation of the act of Congress, and if found to be so, that fact will constitute a good defense to the action. The first section of the act provides that 'every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal.' Every person making such a contract is deemed guilty of a misdemeanor, and on conviction is to be punished by fine or by imprisonment, or both. As the statute

> makes the contract in itself illegal, no recovery can be had upon it when the defense of illegality is shown to the court. The act provides for the prevention of violations thereof, and makes it the duty of the several district attorneys, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations, and it gives to any person injured in his business or property the right to sue, but that does not prevent a private individual when sued upon a contract which is void as in violation of the act from setting it up as a defense, and we think when proved it is a valid defense to any claim made under a contract thus denounced as illegal."

Not every contract or every transaction in contravention of the terms of a statute is void, to the extent that no cause of action can be based thereon, but the courts will search the language of the statute and consider its purposes with a view to ascertaining whether it was the intent of the legislature to outlaw the parties as to alleged rights and causes of action based on the forbidden transactions, in addition to the imposition of the specific penalties provided. The rule is stated in Burck vs. Taylor, 152 U. S. 634, 648:

> "It is familiar law that not every contract in contravention of the terms of a statute is void, and the courts will search the language of the statute to see whether it was the intent of the makers that a contract in contravention of it should be void or not. Harris vs. Runnels, 12 How. 79; Miller vs. Ammon, 145 U. S. 421; Pangborn vs. Westlake, 36 Iowa, 546.
>
> It was in pursuance of this line of thought that the court, in Hobbs vs. McLean, ruled as it did as to

> the effect of a transfer by a contractor with the United States of an interest in his contract to a third party. But it has never been doubted that, as a general rule, a contract made in contravention of a statute is void and cannot be enforced, and the only exception arises when, from an examination of the statute, the courts are able to discern a different or a limited purpose on the part of the law-makers."

In considering the application of the rule to the present case we repeat the language of the court in New Haven, etc., Rd. Co. vs. Interstate Commerce Commission, 200 U. S. 361, 391:

> "It cannot be challenged that the great purpose of the act to regulate commerce, while seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purposes which it was enacted to subserve."

The heavy penalty imposed indicates the importance of the offense involved in the present case. Manifestly it is not the extent of the advantage gained in the particular instance, but the prevention of that gained by a multiplicity of offenses, which Congress had in mind. Because of this very multiplicity of offenses, the great number of shippers, and the impossibility of obtaining knowledge of many viola-

tions, it is impossible for the government to make the act effective by prosecutions alone.

An express company cannot break open packages for the purpose of ascertaining the value by inspection, and as a practical matter cannot subject shippers to cross-examination based on a suspicion that they are declaring a false value, or refusing to declare value for an improper purpose. Consistently with the prompt and efficient conduct of its business it can do no more than was done in the present case, publish its rates based on value, keep them open to public inspection and bring home to the shipper, by its bill of lading, the fact that he must declare the value for the purpose of fixing the rate. If recovery is allowed by a shipper who declares a wrong value or fails to declare value for the purpose of getting an illegally low rate, direct encouragement is given to violate the act. The probabilities of loss are remote, and the possibility of detection slight. If the offender's goods are safely carried, he has obtained an advantage over the honest shipper in the way of rates, while if they are lost both stand on the same footing. On the other hand, refusing a recovery cannot but further the purposes of the act by taking away the inducements to obtain advantages over other shippers.

We respectfully submit that the court below erred in entering judgment for plaintiff, or that it erred in entering judgment for more than fifty dollars.

LAWRENCE MAXWELL,
JOSEPH S. GRAYDON,
Attorneys for Plaintiff in Error.

Supreme Court of the United States.

October Term, 1911.

No. 213.

ADAMS EXPRESS COMPANY,
Plaintiff in Error,

vs.

E. H. CRONINGER,
Defendant in Error.

Error to the Circuit Court of Kenton County, Kentucky.

Brief for Defendant in Error.

STATEMENT OF THE CASE.

The defendant in error, plaintiff below, sought to recover from the Express Company the value of a diamond ring lost by it through the carelessness and negligence of its agents. He sought to enforce his common law right to recover from a common carrier the value of property intrusted to it for carriage.

The defendant answered, admitting the loss of the ring through its negligence, and setting forth a state of facts, which enabled it to present four separate and distinct defenses: First. That the plaintiff received and accepted a receipt, embodying a contract, limiting the liability of the express company to $50. Second. That the plaintiff, in shipping the ring in a sealed package, misled the Express Company as to its value, and in effect committed a fraud, which created an estoppel at common law. Third. That the suit was founded upon a transaction declared a public offense by Congress and hence plaintiff was guilty of a fraud. And fourth. That the effect and purpose of the provisions of the Interstate Commerce Act, particularly Sections 6 and 10, limited its liability to the valuation fixed in the contract embodied in the receipt, upon which its rate was based.

The decision of the Circuit Court of Kenton County, sustaining the demurrer to the answer, determined that each of these four defenses was not well taken; that the contract embodied in the receipt was void; that the conduct of the plaintiff did not constitute fraud or an estoppel. The first three defenses were determined by the common and statute law of the state of Kentucky. The court also determined that the provisions of the Interstate Commerce Act did not give to the Express Company any right, privilege or immunity by which it could avoid the liability imposed by the law of Kentucky. The third question determined was one depending upon a Federal statute, and it is this determination alone which entitles the Express Company to prosecute error to this court, and it is this question alone which is before this court for review.

ARGUMENT.

I.

The Contract Embodied in the Receipt Was Void.

Section 196 of the Kentucky Constitution provides that "no common carrier shall be permitted to contract for relief from its common law liability." This section has been many times construed by the Court of Appeals of Kentucky, and held to apply to all contracts by which a common carrier seeks to limit the extent of its common law liability in any respect.

The case of *The Southern Express Company* v. *Fox & Logan*, 131 Kentucky, 257, was one in which Fox and Logan sought to recover from the Express Company the actual value of a horse shipped under one of its live stock contracts, and injured through the Express Company's negligence. The contract was signed by the shipper, and expressly provided that the rate was based upon a declared value of $75 which the shipper agreed was the value of the horse. The court cited the case of *Adams Express Company* v. *Walker*, 119 Kentucky, 121, which was an action for the value of a dog lost by the Express Company, and in quoting from the opinion of the court in that case said:

> "In the absence of a special contract, it would not be maintained that the defendant is not liable for the value of the dog lost, but our Constitution declares the contract limiting this liability void. So, the contract is as though it had not been made, and the defendant is liable, unless sufficient facts

are shown, independently of the special contract, to avoid the contract for fraud, or to create an estoppel at common law." (Page 129.)

To the same effect are:

Louisville & N. R. Co. v. *Frazee*, 24 Ky. L. Rep., 1273; 71 S. W., 437.
Ohio & M. R. Co. v. *Tabor*, 98 Ky., 503; 34 L. R. A., 685; 32 S. W., 168; 36 S. W., 18.
Cincinnati, N. O. & T. P. R. Co. v. *Graves*, 21 Ky. L. Rep., 684; 52 S. W., 961.
Illinois C. R. Co. v. *Radford*, 23 Ky. L. Rep., 886; 64 S. W., 511.

II.

The Judgment of the State Court Did Not Deprive the Defendant of Any Right, Privilege, or Immunity Secured by the Interstate Commerce Act.

In its answer the Express Company relied especially upon Sections 6 and 10 of the Interstate Commerce Act, but in its argument has set forth extracts from Sections 2, 3, 6, 10 and 20 of the Interstate Commerce Act, and Section 1 of the Act of February 19, 1903, commonly known as the Elkins Act. Section 2 prohibits any common carrier from directly or indirectly, giving any special rate, rebate or drawback, or to receive from any person or persons a greater or less compensation for any service rendered than it receives from any other person or persons for the same service. Section 3 provides that it shall be unlawful for any common carrier to make

or give any undue or unreasonable preference or advantage to any particular person, or to any particular description of traffic. Section 6 requires every common carrier to file with the commission, and to print and keep open to public inspection its schedules of rates, fares and charges, and prohibits it from engaging in interstate transportation until it has complied with said section. Section 10 makes it an offense for any common carrier, or its officers or agents to permit any person or persons to obtain transportation for property at less than the regular rates, by means of false billing, false classification, false weighing or false reports of weight, and likewise makes it an offense for any person or any officer or agent of a corporation, to knowingly and willfully obtain such a preference by means of false billing, false classification, or false representation of the contents of a package, or false report of weight.

These sections, it will be noted, deal exclusively with the matter of rates and rebates. There is no other subject-matter contained therein, and the same is true of the section of the Elkins Act.

Section 20 provides:

> "That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state, shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it, or by any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier,

> railroad or transportation company, from the liability hereby imposed."

This section deals with the right of a common carrier to relieve itself from its liability for the acts of its connecting carriers, who, in effect, are made its agents instead of the agents of the shipper.

The provisions of the act relied upon thus deal with two subjects matter: 1, rates; 2, the liability of the initial carrier for losses caused by connecting carriers. The subject-matter of Section 196 of the Kentucky Constitution is not rates, and it does not deal with the right of a common carrier to limit its liability for the acts of its connecting lines. It deals solely and exclusively, and its subject-matter is confined to the right of a common carrier to contract for relief from its common law liability, for its own acts. It therefore follows that the Interstate Commerce Act does not deal with the same subject-matter as this section of the Kentucky Constitution; and a Kentucky court, having jurisdiction of the parties, was entitled to interpret and to apply that law as it understood it without regard to the Federal statutes.

The purpose of the Interstate Commerce Act is well stated in *Armour Packing Company* v. *United States*, 209 U. S., 56, where Mr. Justice Day quoted from the opinion of Mr. Justice White, in *New York, New Haven & Hartford R. R.* v. *Interstate Commerce Commision*, 200 U. S., 361, as follows:

> "It can not be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring

> the publication of tariffs, and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination."

In *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Company*, 204 U. S., 426, Mr. Justice White, at page 437, said:

> "The act made it the duty of carriers subject to its provisions to charge only just and reasonable rates. To that end the duty was imposed of establishing and publishing schedules of such rates. It forbade all unjust preferences and discriminations, made it unlawful to depart from the rates in the established schedules until the same were changed as authorized by the act, and such departure was made an offense punishable by fine or imprisonment, or both, and the prohibitions of the act and the punishments which it imposed were directed not only against the carriers but against shippers, or any person who, directly or indirectly, by any machination or device in any manner whatsoever, accomplished the result of producing the wrongful discriminations or preferences which the act forbade."

These cases show conclusively, that, in the language of this Court in *Louisville & Nashville Railroad Company* v. *Mottley*, 219 U. S., 467, the purpose of Congress was to, "establish uniform rates for transportation, to give all the same opportunity to know what the rates were, as well as to have the equal benefit of them" (p. 476). They also point unquestionably to the fact that the Interstate Commerce Act deals primarily with rates and discriminations, and that the right of a common carrier to limit

its liability by special contract is not included expressly or by implication.

If these sections of the act deal only with rates, and the Express Company points to no others, it can not be said that Congress has legislated or attempted to legislate upon the subject dealt with by Section 196 of the Kentucky Constitution, and it was therefore the duty of the Kentucky Court to enforce that section.

In *Gulf, Colorado & Sante Fe Railway Company* v. *Hefley,* 158 U. S., 98, the validity of a statute of the state of Texas making it unlawful for a railroad company to charge and collect a greater sum for transporting freight than was specified in the bill-of-lading, was drawn in question, as applied to an interstate shipment, when the rates filed by the railroad company with the Interstate Commerce Commission, were greater than the rates specified in the bill-of-lading. This court held that as applied to an interstate shipment, the Texas law was void. The last syllabus is as follows:

> "When a State Statute and a Federal Statute operate upon the same subject-matter, and prescribe different rules concerning it, and the Federal Statute is one within the competency of Congress to enact, the State Statute must give way."

It will be noted that both of these statutes dealt with the subject of rates.

Mr. Justice Brewer, in delivering the opinion of this court, at page 102, said:

> "Clearly the State and the National Acts relate to the same subject-matter and prescribe different rules. By the State Act,

> the bill-of-lading is made controlling as to the rate collectible, and a failure to comply with that requirement exposes the delinquent carrier to its penalties, while the National Statute ignores the bill-of-lading, and makes the published tariff rate binding, and subjects the offender, both carrier and agent, to severe penalties."

And again, on page 104:

> "Generally, it may be said in respect to laws of this character, that though resting upon the police power of the State, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter, for that power, like all other reserved powers of the States, is subordinate to those in terms conferred by the Constitution upon the nation."

In concluding, he said:

> "The State Statute and the national law operate upon the same subject-matter, and prescribe different rules concerning it. The national law is unquestionably one within the competency of Congress to enact, under the power given to regulate commerce between the States. The State Statute must, therefore, give way."

If the Interstate Commerce Act had contained a provision prohibiting a common carrier engaged in interstate commerce, from limiting its common law liability, or, if that act had expressly provided that no shipper could recover a greater value than that appearing in the carrier's shipping receipt or bill-of-lading, we would be confronted with a situation

in which the United States had in the language of Mr. Justice Brewer sought to legislate upon the "precise subject-matter" covered by Section 196 of the Constitution of Kentucky and that section would have to give way. But that is not this case. The Circuit Court of Kenton County decided that the common law of Kentucky, according to its "understanding and interpretation," rendered the contract between the parties to this case void; and that the facts in this record did not bring the plaintiff within the rule which prohibits a recovery upon a contract induced by fraud.

That court had the right to administer the common law of Kentucky as it saw it, and unless the Congress of the United States has sought to prohibit a carrier engaged in interstate transportation from limiting, or to permit such a carrier to limit, its liability to a stipulated valuation, or has legislated upon that "precise" subject, the State of Kentucky may require common carriers although engaged in interstate commerce, to answer for the whole loss resulting from their negligence, whether there is a contract or not.

In *Pennsylvania Railroad Company* v. *Hughes*, 191 U. S., 477, a bill-of-lading was given in New York, for the transportation of a horse to a point in Pennsylvania. It contained a provision limiting the carrier's liability to a stipulated value in consideration of the rate paid. The common law as interpreted by the Courts of New York and the Federal Courts, permitted a common carrier to limit by contract his liability for his own negligence, but as interpreted by the Courts of Pennsylvania, a carrier could not so limit it. Hughes recovered a judgment against the Pennsylvania Railroad Company for the full

value of the horse, lost through the Company's negligence. This judgment was affirmed by the Supreme Court of Pennsylvania, and the Railroad Company brought the case on error to this court. Mr. Justice Day delivered the opinion, and at page 485 said:

> "It seems to have been conceded at the trial that the law of the state of New York, where the contract was made, permitted the making of a contract limiting the liability of the carrier to the agreed valuation. * * * This rule also prevails in the Courts of the United States, *Hart* v. *Railroad*, 112 U. S., 331, wherein it was held that a contract fairly made and signed by the shipper, agreeing on the valuation of the property carried, with the rate of freight based on such valuation, on the condition that the carrier assumed liability only to the extent of such agreed valuation, in case of loss by the negligence of the carrier, will be upheld as a proper and lawful mode of securing, a due proportion between the amount for which the carrier is responsible and the freight received. and of protecting the carrier against extravagant valuations, BUT THIS IS NOT A QUESTION OF FEDERAL LAW, WHEREIN THE DECISION OF THE HIGHEST FEDERAL TRIBUNAL IS OF CONCLUSIVE AUTHORITY."

The opinion then referred to the decision of the Supreme Court of Pennsylvania by Mr. Justice Potter, and on page 487, quoted therefrom as follows:

> "The third assignment of error suggests that the entry of judgment is in conflict with the Interstate Commerce Act of Con-

> gress. * * * It is not apparent how the act can have any application to this case. It contains nothing bearing upon the validity of a contract limiting the liability of a railroad for a loss or injury caused by negligence. The object of the act seems to be to secure continuous carriage and uniform rates, and to compel the furnishing of equal facilities. We can not see that the entry of judgment in this case interferes in any way with the legitimate exercise of Interstate Commerce."

On page 488, in again referring to the Interstate Commerce Act, he said:

> "While under these provisions it may be said that Congress has made it obligatory to provide proper facilities for Interstate carriage of freight, and has prevented carriers from obstructing continuous shipments on Interstate lines, we look in vain for any regulation of the matter here in controversy. There is no sanction of agreements of this character limiting liability to stipulated valuations, and until Congress shall legislate upon it, is their any valid objection to the state enforcing its own regulations upon the subject, although it may, to this extent, indirectly affect Interstate Commerce contracts of carriage?"

Mr. Justice Day cited the case of *Chicago, Milwaukee, etc., Railway Company* v. *Solan,* 169 U. S., 133, and in closing said:

> "The state has a right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible to the full measure of the loss resulting from their negligence, a con-

> tract to the contrary notwithstanding. This requirement in the case just cited is held not to be an unlawful attempt to regulate Interstate Commerce in the absence of Congressional action providing a different measure of liability, when contracts such as the one now before us, are made in relation to Interstate carriage. Its pertinence to the case under consideration renders further discussion unnecessary."

In the language of Mr. Justice Day, "We look in vain," for any suggestion in the Interstate Commerce Act that Congress has sought to prohibit common carriers from limiting their liability for negligence, or has permitted them to do so, or in any way attempted to deprive a shipper of his common law right to recover the full value of a shipment lost. In other words, such a right of a shipper is a subject-matter upon which Congress has not acted and until it does so act, a Kentucky court "may administer the common law according to its understanding and interpretation of it." (*Pa. R. R. Co.* v. *Hughes*, 191 U. S., 477-486.)

The plaintiff in error claims that by the language used in Section 20 of the Interstate Commerce Act, Congress has attempted to legislate upon the entire subject of the liability of the initial carrier, and that having taken unto itself that subject-matter, all state statutes and regulations affecting initial carriers are void. In short, it argues that although Section 196 of the Constitution of Kentucky might be perfectly valid and enforcible as applied to the second or third carrier receiving an Interstate shipment, it nevertheless is absolutely void as to the initial carrier, for the reason that by Section 20 Congress has

said that the initial carrier shall be liable for the acts of its connecting agents. Prior to the enactment of the Carmack Amendment, the common law permitted a common carrier to limit its liability to its own line. The effect of this amendment is simply to make the connecting carriers the agents of the initial line and to prohibit the initial line from contracting with the shipper for any limit upon that liability. *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S., 186. The section provides that the initial carrier shall be liable to the holder of the bill-of-lading for loss of the property covered by it, whether that loss be caused by it or by any other carrier to which the property may be delivered, and that, "no contract, receipt, rule or regulation shall exempt such common carrier from the liability hereby imposed." To the extent that Congress has sought to legislate upon the subject of initial carriers, it has prohibited them from limiting their liability, instead of extended their right to do so, and has dealt with a single phase of an initial carrier's liability, to-wit: a liability imposed by the act for the conduct of connecting lines and has prohibited them from contracting against that one liability. There has been no attempt, and we can seek in vain for a suggestion of any intention upon the part of Congress to take unto itself the entire subject of the liability of initial carriers and to legislate upon it. The plaintiff in error would have us believe that when Congress prohibited a common carrier from limiting its liability with respect to the obligations imposed by the Interstate Commerce Act, it intended to wipe out every regulation made or upheld by the different states for the protection of their shippers. That such was not the intention

of Congress is apparent from the terms of the Act and that such was not the intention is strengthened by the decisions of the Supreme Judicial Court of Massachusetts and the Court of Appeals of New York in the cases of *Bernard* v. *Adams Express Co.*, 205 Mass., 254, and *Greenwald* v. *Barrett*, 199 N. Y., 170, cited by plaintiff in error. In the former case, the court said:

> "Although the liability stated is made statutory by the enactment, the statement of it in the words 'for any loss, damage, or injury to such property, caused by it or by any common carrier, railroad or transportation company, to which such property may be delivered, or over whose line or lines such property may pass,' includes nothing beyond the liability at common law, except that for the undertaking of other carriers into whose possession the property may come."

The Supreme Judicial Court of Massachusetts further held that the prohibition imposed upon the carrier was, "From exempting oneself from this liability by a contract, receipt, rule or regulation"; in other words, that we had "a statutory declaration that a contract of exemption from liability for negligence is against public policy and void, which is no more than the courts have frequently declared in proceedings at common law."

In the opinion of the court in the New York case, this is made even clearer. The opinion of the Court of Appeals is in part, as follows:

> "The question to be determined upon this appeal is whether this federal legislation forbids an express company from making

a contract with a shipper such as we have quoted from the receipt given to the plaintiffs. If that question is answered in the affirmative, the plaintiffs were entitled to recover whatever they could prove to have been the actual value of the property shipped. If it is answered in the negative, their recovery must be limited to the agreed value of the property under the terms of the receipt.

"The purpose of the provision which we have quoted from the Hepburn Act was obvious. It was to render the initial carrier in the case of interstate transportation over connecting lines liable to the lawful holder of its receipt or bill of lading for any loss or injury to the property shipped, whether such loss or injury occurred after the goods had passed out of the hands of the initial carrier or not; and furthermore to prevent interstate carriers from exempting themselves from liability for the loss of property or damage thereto after it had passed into the hands of another carrier to be transported to its destination."

This Greenwald case was one in which the shipper was seeking to defeat the limitation of the Express Company's liability to $50, which is recognized and upheld by the common law as interpreted in the courts of New York, by relying upon the Carmack Amendment. The court held that this legislation did not forbid an Express Company from making a contract with a shipper such as we have referred to, and, in doing so, necessarily held that Congress had not legislated upon that subject. If it did not prohibit the Express Company from making such a contract in a state where such a contract is held

valid, by the common law, neither did it prohibit a shipper from recovering full value in a state where such a contract is held to be void. In other words, Congress has not legislated upon that subject. The opinion of the Court of Appeals continues as follows:

> "The language of the enactment does not disclose any intent to abrogate the right of common carriers to regulate their charges for carriage by the value of the goods, or to agree with the shipper upon the valuation of the property carried."

Neither does it disclose any intent to abrogate the right of a shipper to recover the full value of goods lost through the negligence of the carrier in a state where the common or statute law as interpreted by its courts prohibit a common carrier from limiting its liability to a valuation fixed in its receipt.

III.

The Right of Plaintiff to Recover, Even if the Action Was Founded on a Transaction Declared to be a Public Offense by an Act of Congress, Was a Question of General Common Law and Has Been Determined in His Favor by the Kentucky Court.

Plaintiff in error contends that the plaintiff can not maintain this action because it is founded on a transaction on his part which is declared to be a fraud on the defendant and a public offense by Acts of Congress. If it is true, which we do not admit, that the transaction upon which the action was

founded was a violation of the Act of Congress, that does not affect the right of plaintiff to recover the value of his property lost by defendant's negligence, unless the courts of the state of Kentucky have declared that the common law of that state prohibits a recovery in such a case. The Circuit Court of Kenton County has declared that the common law of Kentucky as it is understood and administered by that court does not prohibit a recovery on the facts presented in this record. There is no provision in the Interstate Commerce Act prohibiting a recovery by a person obtaining transportation in violation of the Act, and the right which plaintiff had at common law has not been taken away by that Act. It is, therefore, a question of general common law, and in the language of Mr. Justice Day in *Railroad Company* v. *Hughes*, 191 U. S., 477, 486, a court of Kentucky "May administer the common law according to its understanding and interpretation of it, being only amenable to review in the Federal Supreme Court, where some right, title, immunity or privilege, the creation of the Federal power, has been asserted and denied." The Federal Congress *has not* created any new right for the benefit of carriers, nor, has it sought to deprive plaintiff of any of his common law rights, and not having done so, the judgment of the Kentucky Court did not deny to the Express Company any right or privilege, secured to him by the Constitution or Statutes of the United States.

To sustain its claim that a recovery can not be had in a suit founded upon a transaction which is a violation of the statute, plaintiff in error cites a number of cases, the latest of which, and from which counsel quote at length, is that of *Ellison* v. *Adams*

Express Co., 245 Ill., 410. It is apparent both from the facts in that case and from the quotations from the opinion in plaintiff in error's brief that in denying a recovery, the court was not enforcing any Federal law, but was enforcing the common law of Illinois as the highest court of that state understood and interpreted it. The common law as interpreted by that court prohibits a recovery upon a transaction founded upon a violation of a statute, and in that case, the court found that there was a violation of the Interstate Commerce Act. The shipper had knowingly, willfully and intentionally failed to state the value and had expressly instructed his employe not to state it although said employe was familiar with the contents and knew its value.

The common law of Kentucky as interpreted by the Court of Appeals of that state does not prohibit the recovery of the real value of property lost where the only evidence of a declaration of the shipper upon which the supposed misrepresentation or fraud is founded is the contract which by that law is declared to be void.

In the case of *Adams Express Co.* v. *Walker*, 119 Ky., 121, heretofore cited, the shipper delivered to the Express Company a dog securely crated. The dog was lost and the shipper sued to recover $250. The defendant by its answer denied that the value of the dog lost exceeded $25, and alleged further that prior to the delivery of the dog, it notified plaintiff that its charges would be based upon the value of the dog, said value being unknown to the defendant, and requested plaintiff to declare the value; that its charges would be $2.70 if the value did not exceed the sum of $50, and proportionately greater if the value of the dog did exceed $50; that the plaint-

iff declared that the value of this dog and another shipped with it did not exceed the sum of $50, and that on the faith of said declaration, and in consideration of the charge of $2.70, based upon said valuation, plaintiff and defendant entered into a written agreement. It then pleaded the terms of its live stock contract. It was argued in that case that the declaration of the shipper's agent who delivered the dogs was a fraud upon the carrier which estopped the shipper from claiming any greater amount. The court upheld a judgment for the full amount claimed, holding that it was essential for the carrier to show a false statement made by the shipper and relied upon by the carrier outside of the contract.

In the case at bar, it will be noted that the petition alleges (Rec., 2) that the package was delivered to the Express Company "without any inquiry or demand being made by the defendant to know its value or contents." There was therefore no willful violation of the act and it would also seem that "
falls clearly within the rule laid down by the Interstate Commerce Commission in "*In the Matter of Released Rates*" (May 14, 1908, 13 I. C. R., 550-554, No. 933 cited in Plaintiff in Error's Brief at p. 64). The Interstate Commerce Commission through Commissioner Lane made a report In the Matter of Released Rates in which they treated the subject in three different classes. Class 3 dealt with: "Rates Conditioned upon the shippers agreeing that the Carrier's liability shall be limited to a certain specified value." This class was sub-divided into four sub-classes. Sub-class (a) dealt with losses beyond the carrier's control. Sub-class (b) dealt with goods upon which a "specific value" had been placed by the shipper, and (c) with cases

in which "the specified amount does not purport to be an agreed valuation, but represents an attempt upon the part of the carrier to limit the amount of the recovery to a fixed sum, irrespective of the actual value."

The commissioner reported that the stipulation referred to in Sub-class (c) was void as against loss due to the carrier's negligence or other misconduct, and at p. 554 said:

> "Much confusion has arisen from failure to distinguish between this situation and the situation comprehended in *Hart* v. *Pennsylvania Railroad Co., supra.* That decision was expressly predicated upon the principle of estoppel; the shipper had misrepresented the value of his property, and had thereby secured the benefit of a lower rate than he was properly entitled to by virtue of the real value. He was estopped by his fraudulent conduct from recovering an amount in excess of the value he had declared. In the case we are now considering, the requisites of estoppel are wanting. An estoppel can not arise unless the party invoking it has been the victim of misrepresentation and has himself acted in good faith. Can it possibly be argued that when a carrier has arbitrarily placed in its bill of lading a stipulation limiting the amount of its liability, regardless of the actual value of the property, it may claim the benefit of an estoppel? Obviously not; it has not acted in good faith, neither has it been the victim of misrepresentation."

On page 561, the court after recognizing the right of carriers to fix a scale of charges, graduated according to value, held as follows:

"III. If a rate is conditioned upon the shipper's agreeing that the carrier's liability shall not exceed a certain specified value.

* * * * * *

"*c.* The stipulation is void as against loss due to the carrier's negligence or other misconduct if the specified amount does not purport to be an agreed valuation, but has been fixed arbitrarily by the carrier without reference to the real value."

It is clear therefore that the transaction upon which this case is founded was not a violation of the Interstate Commerce Law as that law is interpreted by the Interstate Commerce Commission and that under the ruling of this Commission, the contract of the Express Company, attempting to limit its liability was void and the plaintiff is entitled to recover the full value of the diamond.

We respectfully submit that the court did not err in entering judgment for the plaintiff for the amount claimed with interest and that that judgment should be affirmed.

MORISON R. WAITE,
JOHN RANDOLPH SCHINDEL,
Attorneys for Defendant in Error.